

**U.S. Bankruptcy Court  
Eastern District of Michigan (Detroit)  
Bankruptcy Petition #: 13-53846-swr**

*Date filed:* 07/18/2013

*Assigned to:* Judge Steven W. Rhodes  
Chapter 9  
Voluntary  
No asset

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Filing Date	#	Docket Text
11/27/2013	<u>1870</u>	Objection to (related document(s): <u>1520</u> Motion to Borrow / <i>Motion of the Debtor for a Final Order Pursuant to 11 U.S.C. §§ 105, 362, 364(c)(1), 364(c)(2), 364(e), 364(f), 503, 507(a)(2), 904, 921 and 922 (I) Approving Post-Petition Financing, (II) Granting Liens and Providing) Objection of Syncora Guarantee Inc. and Syncora Capital Assurance Inc. to Motion of the Debtor for a Final Order Pursuant to 11 U.S.C. §§ 105, 362, 364(C)(1), 364(C)(2), 364(E), 364(F), 503, 507(A)(2), 904, 921 and 922 (I) Approving Post-Petition Financing, (II) Granting Liens and Providing Superpriority Claim Status and (III) Modifying Automatic Stay Filed by Interested Parties Syncora Capital Assurance Inc., Syncora Guarantee Inc. (Attachments: # <u>1</u> Index # <u>2</u> Exhibit A – Hr'g Tr., Nov. 14, 2013, 11:01 ET # <u>3</u> Exhibit B – Exit Engagement Letter # <u>4</u> Exhibit C – Email from Anne Marie Langan to Todd Snyder # <u>5</u> Exhibit D – Hr'g Tr., Nov. 14, 2013, 14:36 ET # <u>6</u> Exhibit E – Moody's Report # <u>7</u> Exhibit F – Funding for Detroit Announced on Sept. 27, 2013 # <u>8</u> Exhibit G – Cash Flow Variance Report June 2013 # <u>9</u> Exhibit H – Cash Flow Variance Report FY 2014 # <u>10</u> Exhibit I – Syncora Proposal # <u>11</u> Exhibit J – Hrg Tr., Oct. 15, 2013) (Bennett, Ryan) (Entered: 11/27/2013)</i>
12/02/2013	<u>1884</u>	Transcript Order Form of Hearing November 27, 2013, Filed by Interested Parties Syncora Capital Assurance Inc., Syncora Guarantee Inc.. (Bennett, Ryan) (Entered: 12/02/2013)
12/02/2013	<u>1899</u>	Motion to Compel the Production of Privilege Log <i>Motion of the Objectors to Compel the Production of Privilege Log</i> Filed by Interested Parties Syncora Capital Assurance Inc., Syncora Guarantee Inc. (Attachments: # <u>1</u> Index – Summary of Attachments # <u>2</u> Exhibit 1 – Proposed Order # <u>3</u> Exhibit 2 – Notice of Motion and Opportunity to Object # <u>4</u> Exhibit 3 – None [Brief not Required] # <u>5</u> Exhibit 4 – None [Separate Certificate of Service to be Filed] # <u>6</u> Exhibit 5 – Affidavits [Not Applicable] # <u>7</u> Exhibit 6 – Documentary Exhibits [Not Applicable]) (Hackney, Stephen) (Entered: 12/02/2013)
12/09/2013	<u>1980</u>	Exhibit List <i>Syncora Guarantee Inc. and Syncora Capital Assurance Inc.'s Disclosure of Exhibits in Advance of the Hearing on December 17–19, 2013</i> Filed by Interested Parties Syncora Capital Assurance Inc., Syncora Guarantee Inc.. (Hackney, Stephen) (Entered: 12/09/2013)
12/09/2013	<u>1983</u>	Exhibit List/ <i>Debtor's List of Exhibits for Hearing on the City of Detroit's Assumption Motion [Dkts. 17 and 157] and Motion to Approve Post-Petition Financing [Dkt. 1520]</i> Filed by Debtor In Possession City of Detroit, Michigan. (Bennett, Bruce) (Entered: 12/09/2013)
12/10/2013	<u>2023</u>	Omnibus Reply to (related document(s): <u>1520</u> Motion to Borrow filed by Debtor In Possession City of Detroit, Michigan) / <i>Omnibus Reply of the Debtor to Objections to Debtor's Motion for Approval of Postpetition Financing</i> Filed by Debtor In Possession City of



			Detroit, Michigan (Heiman, David) (Entered: 12/10/2013)
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**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN**

In re

CITY OF DETROIT, MICHIGAN,

Debtor.

)

) Chapter 9

)

) Case No. 13-53846

)

) Hon. Steven W. Rhodes

)

) **Re: Docket No. 1520**

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**OBJECTION OF SYNCORA  
GUARANTEE INC. AND SYNCORA CAPITAL  
ASSURANCE INC. TO MOTION OF THE DEBTOR FOR  
A FINAL ORDER PURSUANT TO 11 U.S.C. §§ 105, 362,  
364(C)(1), 364(C)(2), 364(E), 364(F), 503, 507(A)(2), 904, 921  
AND 922 (I) APPROVING POST-PETITION FINANCING,  
(II) GRANTING LIENS AND PROVIDING SUPERPRIORITY  
CLAIM STATUS AND (III) MODIFYING AUTOMATIC STAY**

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Syncora Guarantee Inc. and Syncora Capital Assurance Inc. (collectively, “Syncora”) file this objection to the Motion of the Debtor for a Final Order Pursuant to 11 U.S.C. §§ 105, 362, 364(C)(1), 364(C)(2), 364(E), 364(F), 503, 507(A)(2), 904, 921 and 922 (I) Approving Post-Petition Financing, (II) Granting Liens and Providing Superpriority Claim Status and (III) Modifying Automatic Stay, dated November 5, 2013 [Dkt. No. 1520] (the “DIP Motion”). In support of its objection, Syncora respectfully states as follows:

### **Preliminary Statement**

1. The postpetition financing at issue in the DIP Motion is unprecedented in Chapter 9 both in its size and its scope. This facility has two purposes: (a) finance the payoff of the Swap Counterparties;<sup>1</sup> and (b) provide a downpayment on wide-ranging reinvestment initiatives designed to bring about, as the City of Detroit (the “City” or “Detroit”) describes it, a “renaissance.” (DIP Mot. ¶ 19.)

2. While Syncora acknowledges that the City faces real challenges, Chapter 9 is not, as the City apparently believes, intended to serve as a vehicle for financing a municipality’s “renaissance” by green-lighting public spending projects without regard to how such spending affects creditors. (DIP Mot. ¶ 19)

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<sup>1</sup> Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the DIP Motion.

(noting that “without significant reinvestment . . . [Detroit’s] renaissance is not possible”). Rather, Chapter 9 is, first and foremost, a debt adjustment process. And the legislative history, case law, and structure of Chapter 9 each affirm, time and again, that the primary purpose of Chapter 9 is to facilitate a mutually agreeable plan of adjustment that minimizes creditor losses while simultaneously allowing for the survival of the municipality and the continued provision of necessary public services.

3. Disregarding the purpose of, and policies behind, Chapter 9, the DIP Motion is yet another attempt by the City to hurriedly advance a complicated financial transaction that addresses plan-related issues — namely, the appropriate payouts to creditors, the City’s right to grant primary liens, and the City’s attempt to “kick-start” a ten-year, \$1.25 billion spending campaign funded by \$650 million of Chapter 9-imposed creditor losses. Yet, by asking the Court to approve a transaction that effectively implements the City’s soon-to-be-filed plan of adjustment, the City threatens to short-circuit plan confirmation requirements that ensure fairness to creditors. This approach is particularly troublesome given that the City has not provided creditors with the necessary information to assess a number of significant questions, such as how it intends to value its largest assets (*e.g.*, the City’s art collection) and the size of its pension and OPEB claims.

4. While the Bankruptcy Code has many benefits for municipal debtors, those benefits come with the burden that they be employed in the best interests of creditors. Although the City can borrow money without Court approval, here the City has asked the Court not only to authorize a section 364(c) credit transaction but also to make specific findings regarding the need for such postpetition financing, the use of the proceeds “to fund expenditures designed to contribute to the improvement of the quality of life in the City,” and, critically, good faith for section 364(e) purposes. (DIP Mot. Ex. 1 at ¶¶ D, F, 22.) As a result of the City’s chosen course of action, the DIP Motion at a minimum must be evaluated in reference to the requirements imposed by section 364 of the Bankruptcy Code.

5. In an attempt to avoid the requirements of section 364, the City claims that section 904 of the Bankruptcy Code requires heavy deference to the City’s “business judgment” regarding the needs of its citizenry.<sup>2</sup> Contrary to the City’s claims, section 904 of the Bankruptcy Code does not inoculate the City’s decisions

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<sup>2</sup> Notably, the only elected officials to pass judgment on the City’s borrowing and spending proposals — the City Council — unanimously voted to reject the relief sought in the DIP Motion. The City Council determined that the proposed financing “does not seem to be in the best interest of the City,” “seems to primarily benefit the two Swap Counterparties,” “give[s] Barclays too much power and control over the City’s revenues and future and limits the City’s ability to negotiate or resolve other claims in bankruptcy,” and will not result in the creation of new revenue such that “it is difficult without additional information to determine the [spending] would be prudent investments.” (Resolution Regarding the Emergency Manager’s Post Petition Financing Proposal [Dkt. No. 1396] (the “City Council Resolution”).)

from any review. Instead, the Court must determine whether, among other things, the DIP Motion is: (a) a sound exercise of the City's business judgment; (b) necessary and essential for the continued operation of the City; and (c) in the best interests of the City's creditors. The DIP Motion does not satisfy any of these requirements.

6. First, the City has failed to show that the proposed borrowing is in the best interests of its creditors, many of whom are objecting. Second, the City's motion fails to establish that other monies are not available to address its short-term needs while the City and its creditors craft a mutually agreeable plan of adjustment. Nor can the City make such a showing in light of the hundreds of millions of dollars it has accumulated in cash since June 2013 and in recently received federal and private grant monies. Third, the City has failed to follow the statutory requirements of P.A. 436. Fourth, the DIP Motion is inextricably tied to the Assumption Motion — another hurried transaction that has garnered widespread creditor objection and should be denied in its own right.

7. Although it is possible to assess the Barclays DIP (as defined below) within the framework required by section 364, Syncora submits that, when considering a transaction that has significant plan implications (*i.e.*, the DIP Motion), the better approach is to assess the transaction in reference to confirmation standards. For instance, the Court should consider whether the City's

postpetition borrowing comports with the “best interests of creditors” test. To satisfy this test, the City must show, among other things, that the transaction affords all creditors the potential for the greatest economic return from its assets.

8. Syncora therefore objects to the DIP Motion and respectfully requests that the Court either deny or defer ruling on the DIP Motion until the City better explains how the Barclays DIP fits into its proposed plan of adjustment.

### **Background**

9. In June 2013, the City entered into secret negotiations with the Swap Counterparties. The result of these negotiations was the Forbearance Agreement, which purportedly provided the City with unfettered access to the casino tax revenues and the ability to unilaterally terminate the Swaps. Though the City claimed that the Forbearance Agreement was in the best interests of its creditors, its motion to assume the Forbearance Agreement [Docket No. 17] (the “Assumption Motion”) generated widespread creditor hostility. In the face of this hostility, the City decided to postpone the hearing on the Assumption Motion. Consequently, the Assumption Motion — previously characterized by the City as a time-sensitive, essential step that could tolerate not even the slightest delay — has remained pending for more than four months. (Assumption Mot. Ex. 5, Affidavit of Kevyn D. Orr ¶ 22.)

10. Rather than reconsider the wisdom of the Forbearance Agreement, the City has instead chosen to double-down. Beginning in September, the City solicited bids to obtain the financing necessary to exercise the early termination option in the Forbearance Agreement. As part of the solicitation process, the City sought and obtained proposals from various lenders to secure postpetition financing.

11. On October 11, 2013, the City announced that it had received a \$350 commitment from Barclays Capital Inc. (“Barclays”) for the postpetition financing (the “Barclays DIP”). The City did not, however, procure this financing simply to terminate the Swaps. Instead, the City went a step further and borrowed another \$110 million — in addition to the approximately \$240 million to terminate the Swaps (the “Swap Termination Financing”) — to fund certain spending programs relating to the City’s “renaissance” (the “Quality of Life Financing”). (DIP Mot. ¶¶ 14-16, 19.) Specifically, the City intends to use the Quality of Life Financing on blight removal, public safety, and technology infrastructure. (*Id.* ¶ 7.) The City notes, however, that it “may ultimately decide to apply the proceeds to pursue an array of specific projects.” (*Id.* ¶ 23.)

12. The Barclays DIP includes the following terms:

- The City will be obligated to pay the full Commitment Fee of \$4.375 million even if the Barclays DIP is not approved.<sup>3</sup>
- The City has already engaged Barclays to provide exit financing and, if it does not, it must pay Barclays another fee.
- The City will pledge its income and wagering tax revenues as collateral, as well as proceeds from assets sales that exceed \$10 million.
- The Barclays DIP has a floating interest rate with a 3.5% variable interest rate floor that is subject to a market flex provision which could result in the actual minimum interest rate being as high as 6.5%.

(*Id.* ¶ 47; Ex. B, Exit Engagement Letter § 6(c); Fee Letter [Docket No. 1761].)

13. On the same day that the City announced the Barclays DIP, the City submitted that proposal and the emergency manager's proposed order number 17 to the City Council. (*Id.* ¶ 43.) As part of this submission, the City provided the City Council with certain of the terms of the Barclays DIP. (*Id.* ¶ 43.) The City did not, however, provide two of the term sheets referenced in the Barclays DIP, nor did it initially provide the commitment or fee letters themselves.

14. Under P.A. 436, the City Council had ten days to review the Barclays DIP and decide whether to approve or reject that proposed transaction. (*Id.* ¶ 41.) To better understand this complex transaction, the City Council submitted

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<sup>3</sup> The City did not disclose in the DIP Motion that it has already paid half of this fee to Barclays. (Ex. A, Hr'g Tr. 8:14-16, Nov. 14, 2013, 11:01 ET.)

numerous questions to the City’s advisors. (City Council Resolution at 3.) And while the City’s advisors provided “some information,” the City Council was left with “a host of uncertainties and unanswered questions.” (*Id.*)

15. On October 21, 2013, the City Council held a hearing to discuss the merits of the Barclays DIP. Not one of the City’s legal or financial advisors deigned to appear at the hearing to answer any of the City Council’s questions regarding the credit facility. Many of the City Council members also expressed concern that the Barclays DIP put the interests of the Swap Counterparties above those of the City’s citizens. At the conclusion of the hearing, the City Council — the only elected officials to pass judgment on the City’s borrowing and spending proposals — unanimously voted to reject the Barclays DIP. In its resolution, the City Council made the following findings, among others:

- “The proposed Debtor-in-Possession Financing transaction is an extremely complex deal on a number of fronts *that does not seem to be in the best interest of the City.*”
- The Barclays DIP appears to be “*putting the interests of lenders before the interests of the City and its residents.*” The goal seems to be to ensure protection of the lenders at the detriment of all other interested parties.”
- The Barclays DIP “seems to primarily benefit the two Swap counterparties Bank of America and UBS.”
- “There is no guarantee that replacement funding will be available by this lender or any other lender when these loans mature in as little as one year *placing the City into a very foreseeable default position* triggering onerous default penalty provisions.”



- “Not unlike the Swap Agreements that have been universally recognized as a bad deal for the City, Barclays is requiring the City to pledge its major revenue in order to secure this transaction. The City will have to pledge not only its casino wagering tax revenue but also its income tax revenue. These are the City’s two most stable general fund revenue sources. Barclays is also requiring prepayment of any asset monetization net proceeds over \$10M. ***This would give Barclays too much power and control over the City’s revenues and future*** and limits the City’s ability to negotiate or resolve other claims in bankruptcy.”
- “[I]t appears that none of the proceeds [from the Quality of Life Bonds] will be used to create new revenue. If the City is ever to achieve a stronger financial position, strengthening revenues and revenue collection under the City’s control is key. . . . ***It is difficult without additional information to determine whether the use of these funds would be prudent investments. Additionally, it would be unwise to incur more debt to facilitate the payment of costly consultants.***”

(City Council Resolution at 1-4 (emphasis added).)

16. After the City Council rejected the Barclays DIP, Syncora presented the City Council with an alternative proposal that contained more favorable postpetition financing terms than the Barclays DIP on October 23, 2013. Syncora and the City Council then engaged in good faith negotiations during which they exchanged several different proposals. Although the City Council believed that Syncora’s alternative proposal was “clearly an improvement over Barclays,”<sup>4</sup> the council determined that it did not have time to fully vet Syncora’s proposal and

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<sup>4</sup> Ex. C, Email from Anne Marie Langan to Todd Snyder (Oct. 25, 2013, 14:09 ET).

ultimately decided not to offer an alternative proposal. Even though the City was made aware of Syncora's proposal, it did not, at any point, approach Syncora to explore this financing alternative. Given the time constraints, as well as the City Council's concerns with the Barclays DIP, the City Council implicitly offered a "no transaction" option to the emergency financial assistance loan board (the "Loan Board") as its "alternate proposal" under P.A. 436. (City Council Resolution at 4.)

17. Notwithstanding the widespread opposition to the Assumption Motion and the City Council's rejection of the Barclays DIP, the City has decided to move forward on both. In doing so, however, the City imposes important strategic limitations on its future conduct, including the following:

- The Barclays DIP encumbers previously unencumbered assets and frustrates the monetization of certain key assets (e.g., the City's art collection).
- The Barclays DIP invites yet another group of creditors to this Chapter 9 case. And these creditors will have liens and superpriority status, effectively subordinating existing creditors.
- The Barclays DIP grants liens that are actually broader than the current liens of the Swap Counterparties on the casino tax revenues.
- The Barclays DIP does not provide the City with the possibility to extend its financing. Instead, any refinancing must be part of the City's plan of adjustment.
- The City cannot dismiss the bankruptcy case because the Barclays DIP would then mature.

- The City's 3.5% variable interest rate on the Barclays DIP is subject to a market flex provision which could result in the actual minimum interest rate being as high as 6.5%.
- The Barclays DIP restricts the City's ability to access the capital markets again during this Chapter 9 case.

### **Objection**

18. Although the Court has discretion under section 364 of the Bankruptcy Code to authorize certain postpetition debtor credit transactions, courts have also recognized “that their discretion is not unbridled.” *See* 11 U.S.C. § 364(c) (stating that the Court “may authorize” certain credit transactions) (emphasis added); *In re Ames Dep’t Stores, Inc.*, 115 B.R. 34, 37 (Bankr. S.D.N.Y. 1990). In particular, the City must demonstrate that the Barclays DIP is “necessary,” that the terms of the transaction are “fair, reasonable, and adequate,” and that the borrowing is in the best interests of its creditors. These checks on postpetition borrowing are especially important where, as here, notwithstanding the City Council’s rejection of the deal, the City has asked the Court to approve its incurrence of another \$350 million of funded debt to facilitate a contested \$240 million settlement payment, and \$110 million of pre-plan “renaissance” spending that is unprecedented in the history of Chapter 9. To be sure, not a single case cited by the City as authority in the DIP Motion involved court approval of a credit transaction that even mildly resembles the proposed uses of the Barclays DIP proceeds.

19. As discussed below, the Barclays DIP does not meet the section 364 requirements because: (a) it is not a sound exercise of the City's business judgment; (b) it is not necessary, essential, or appropriate to preserve the City's assets and continue the operation of the City; (c) the proposed transaction is not in the best interests of the City's creditors (d) the terms of the Barclays DIP are not fair, reasonable, and adequate under the circumstances; (e) the City had a better offer available; (f) the City failed to comply with P.A. 436 in its interactions with the City Council; and (g) the City intends to utilize the Barclays DIP for an improper purpose.

**I. The Barclays DIP Does Not Meet the Standards for Approval of Postpetition Financing Under Section 364 of the Bankruptcy Code.**

20. When evaluating whether a postpetition financing proposal satisfies section 364 of the Bankruptcy Code, courts consider the following factors:

- a. Whether the proposed transaction is an exercise of the debtor's reasonable business judgment;
- b. Whether alternative financing is available on any other basis;
- c. Whether the proposed transaction is in the best interests of both the estate and its creditors;
- d. Whether any better offers, bids, or timely proposals are before the court;
- e. Whether the transaction is necessary, essential, and appropriate to preserve estate assets and for the continued operation of a debtor's business;

- f. Whether the terms of the proposed financing are fair, reasonable, and adequate given the circumstances; and
- g. Whether the proposed transaction was negotiated in good faith and at arm's length (collectively, the "Farmland Factors").

*See, e.g., In re Farmland Indus., Inc.*, 294 B.R. 855, 879–80 (Bankr. W.D. Mo. 2003) (collecting cases); *Bland v. Farmworker Creditors*, 308 B.R. 109, 113–14 (S.D. Ga. 2003) (applying the Farmland Factors); *In re Sterling Min. Co.*, 2009 WL 2514167, at \*3-5 (Bankr. D. Idaho Aug. 14, 2009) (same).

21. The Farmland Factors are based on the requirement inherent in section 364 that any postpetition financing be necessary, essential, and appropriate to preserve estate assets while also allowing for the continued operation of a debtor's business. And, while these factors are most often applied in the Chapter 11 context (*i.e.*, where a debtor obtains postpetition financing to ensure that it has sufficient liquidity to operate the business during the case), the legislative history and case law surrounding Chapter 9 also support their application to the Barclays DIP.

22. In the DIP Motion, the City implicitly argues against the application of the Farmland Factors in favor of a much narrower standard — namely, that it need only demonstrate that the Barclays DIP was a sound exercise of its business judgment. (DIP Mot. ¶ 54.) However, the City's argument for such a narrow standard is belied by the very cases it relies upon in the DIP Motion. For example, as part of the DIP Motion, the City cites *In re Crouse Group, Inc.*, 71 B.R. 544

(Bankr. E.D. Pa. 1987). Notably though, in that case, the court rejected the debtor's argument that the court should merely defer to the debtor's judgment in reviewing the proposed section 364(c) transaction. *Id.* at 550. Instead, the court held that the debtor also needed to establish that the transaction was fair, reasonable, and adequate under the circumstances, and that the credit transaction was necessary to preserve assets of the estate. *Id.* at 551. The *Crouse* court ultimately denied the proposed section 364(c) transaction. *Id.* Similarly, the City cites *In re Trans World Airlines, Inc.*, 163 B.R. 964 (Bankr. D. Del. 1994) for the proposition that the Court should defer to the City's business judgment. (DIP Mot. ¶ 54.) As a threshold matter, *Trans World Airlines* is not even a postpetition financing case. Moreover, as in *Crouse*, the *Trans World Airlines* dicta also looked beyond the debtor's business judgment and relied on the transaction at issue being in the best interests of the creditors. *Trans World Airlines*, 163 B.R. at 974.

23. Consistent with the narrow standard that the City proposes, it has also insisted that the Court may not even consider evidence regarding the City's purported need for the funds.<sup>5</sup> For example, during the November 14, 2013,

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<sup>5</sup> Section 904 of the Bankruptcy Code does not, as the City claims, prohibit the Court's review into the uses of the Quality of Life Financing. Where, as here the City consented to the Court's review of its action, the Court may assess whether the Quality of Life Financing satisfies the best interests of creditors test that is part of section 364 of the Bankruptcy Code. Yet another case relied upon by the City, *In re Sky Valley, Inc.*, supports this proposition. See 100 B.R. 107, 115 (Bankr. N.D. Ga. 1988) (making an express finding that the section

hearing, counsel for the City stated that, “in connection with the 364 motion, [the Court] will hear and adjudicate our business judgment as to whether or not we needed to borrow the money . . . and whether or not the terms on which we want to borrow that money are reasonable and in everybody’s best interest.” (Ex. D, Hr’g Tr. 20:3–8, Nov. 14, 2013, 14:36 ET.) Indeed, the Court cannot possibly determine whether the City needed to borrow money unless it inquires into how that money will be used.

24. The City’s proposed standard is also contradicted by the DIP Motion and its representations to the Court. For example, in the DIP Motion, the City cites *In re Ames Dept. Stores, Inc.* for the proposition that “courts have discretion under section 364 of the Bankruptcy Code to permit debtors to exercise reasonable business judgment so long as . . . the financing agreement’s purpose is primarily to benefit the estate and not a party in interest.” (DIP Mot. ¶ 54.) Of course, the Court can only assess the purpose of the financing agreement if it may also inquire into the use of the financing proceeds. Purpose is, in other words, inextricably tied to use.

25. Additionally, in the DIP Motion, the City provides some high-level information regarding the City’s need for, and use of, the Barclays DIP proceeds.

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364 credit transaction was “in the best interests of creditors,” including unsecured and subordinated creditors).

However, if, as the City is likely to claim, the Court is not permitted to inquire into the City's use of those proceeds, then there would have been no need to explain how it intends to utilize those proceeds.

26. Thus, while it is true that there is some uncertainty surrounding exactly which standard governs the Barclays DIP — mainly because a transaction like the Barclays DIP has never been considered in the Chapter 9 context<sup>6</sup> — even the City concedes that the Court must nevertheless inquire into the City's need for the funds and whether the transaction meets the best interests of creditors test. Although Syncora submits that the Farmland Factors provide the proper framework to assess the Barclays DIP, even under a more limited standard that simply considers the best interests of creditors and the City's need for the borrowed funds, the DIP Motion does not satisfy the requirements under section 364 of the Bankruptcy Code.

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<sup>6</sup> In its analysis of the Barclays DIP, Moody's recognizes the unprecedented nature of the City's proposed postpetition financing. (Ex. E, Moody's Report at 1 ("In the municipal sector, however, DIP financings are unprecedented. Detroit is likely the first local government to propose this type of post-petition financing structure as it continues to navigate the Chapter 9 bankruptcy process, while balancing the competing interests of operating an insolvent city and negotiating with a variety of creditors.").)



**1. The City Did Not Exercise Sound Business Judgment When It Decided that It Needed to Borrow Money to Finance Its Reinvestment Initiatives Prior to Consideration of a Plan of Adjustment.**

27. In the DIP Motion, the City claims that its “decision to obtain the Postpetition Financing is well supported by sound business judgment and should be approved.” (DIP Mot. ¶ 7.) According to the City, “[w]ithout borrowed funds, there is a material risk that the City would have to substantially cut back or eliminate its reinvestment efforts *in the near-term*, and the City’s ability to invest in the future would continue to be hamstrung and imperiled by the City’s ongoing financial constraints.” (DIP Mot. ¶ 22 (emphasis added).)

28. As demonstrated below, however, the City does not actually need to borrow the money in the short-term to pursue substantial reinvestment initiatives. As a result, the Barclays DIP is neither necessary nor a sound exercise of business judgment.

29. To begin, the City is set to receive more than \$350 million in federal and private grants over the next two years. These grants includes: \$152.6 million for demolishing blighted properties, revitalizing neighborhoods, and redeveloping Detroit; \$25 million to hire 150 firefighters and purchase arson detection equipment; \$1.9 million to hire new police officers; \$600,000 to improve the police IT system; \$155.5 million to improve transportation systems; \$22.1 million to help create a 21st century Detroit; and 100 new police cars and 23 ambulances

are being donated by Downtown Detroit. (Ex. F, Funding for Detroit Announced on Sept. 27, 2013; Ross Benes, *Detroit Welcomes New Ambulances, Police Cars Donated By Local Businesses* (Aug. 23, 2013, 2:49 PM), <http://www.craigslist.com/article/20130822/NEWS/130829932/>.) Significantly, much of this federal and private grant money is intended for the very reinvestment initiatives that the City has identified in its DIP Motion — blight remediation, public safety, and IT upgrades. In short, the City already has at its disposal hundreds of millions of dollars in federal funds that are earmarked specifically for the purposes the City has identified as mission critical.

30. In addition, the City has conceded that many of the reinvestment initiatives that it plans to institute are not yet ready for implementation. With respect to blight remediation, for example, the City has noted that “it continues to investigate and determine the most effective way to accomplish blight removal, including which geographic areas to focus its efforts on and other factors . . . .” (DIP Mot. ¶ 32.) Similarly, with respect to IT services, the City “will *begin* the process of issuing a ‘request for proposals’ and selecting a new system in 2014” and anticipates significant implementation efforts to occur at some unspecified time. (DIP Mot. ¶ 30.) Along these same lines, the City has also conceded that it “may ultimately decide to apply the proceeds of the Quality of Life Financing to pursue an array of specific projects . . . .” (DIP Mot. ¶ 23.) In short, the City itself

has not fully mapped out how it will use the very monies it seeks to borrow and thus refused to bind itself to spending the money in any particular fashion.

31. Finally, upon its filing for bankruptcy (and, in the case of the COPs, before filing), the City stopped paying certain of its unsecured creditors. As a result, the City's cash flow is better than it has been in many years. Between June 2013 and September 2013, for example, the City's cash on hand increased from \$36 million to \$128.5 million. (*Compare* Ex. G, Cash Flow Variance Report June 2013, *with* Ex. H, Cash Flow Variance Report FY 2014.) Consequently, if the City believes that it has a present and immediate need to devote money to these reinvestment initiatives, the more prudent business decision is to invest available funds (and the aforementioned grant money) rather than plunge further into debt.

32. In light of the above, the City cannot meet its burden of demonstrating that the Quality of Life Financing is necessary or a sound exercise of business judgment.

## **2. The Barclays DIP Is Not in the Best Interests of the City or its Creditors.**

33. Under section 364 of the Bankruptcy Code, courts must consider whether the proposed financing is in the best interests of the City's creditors. *In re Roblin Indus., Inc.*, 52 B.R. 241, 244 (Bankr. W.D.N.Y. 1985) (citing *In re Texlon Corp.*, 596 F.2d 1092, 1098–99 (2d Cir. 1979)). As the City explains in the DIP Motion, it intends to utilize \$110 million for the Quality of Life Financing, which

will be utilized to “kick-start” the City’s reinvestment initiatives. (DIP Mot. ¶ 22.) However, the Quality of Life Financing violates section 364 because it is not in the best interests of the City’s creditors.

34. Though the City claims that its reinvestment initiatives could “potentially improve recoveries for creditors,” the City has not offered any concrete evidence that incurring additional debt for this purpose will generate any long-term upside for the City’s creditors. (DIP Mot. ¶ 20.) In fact, the only evidence that the City offers are Mr. Moore’s conclusory statements that the City’s proposed ten-year, \$1.25 billion reinvestment campaign will reverse downward trends in the City’s fiscal and economic outlook. (Moore Dec. ¶¶ 9–10.) The Moore Declaration does not demonstrate how such expenditures would actually strengthen the City’s tax base, reverse the flow of residents leaving the City, increase creditor recoveries, or improve the City’s fiscal outlook in the long term. *Cf. In re Swedeland Dev. Grp., Inc.*, 16 F.3d 552, 564 (3d Cir. 1994) (rejecting argument that property to be developed under postpetition loan “is increased in value simply because a debtor may continue with construction which might or might not prove to be profitable”); *In re Mosello*, 195 B.R. 277, 289 (Bankr. S.D.N.Y. 1996) (denying motion to authorize postpetition loan to develop property because “the debtors’ development scheme is beset by uncertainty and risk, and the ultimate outcome of the project is a matter of speculation based upon assumptions

which cannot be quantified or verified by objective evidence”). Moreover, the City has offered no other evidence showing how the “renaissance” spending benefits creditors in either the short- or long-term. To the contrary, the City’s own financial projections show no increase in revenues at any time in the next ten years. (*Declaration of Kevyn D. Orr in Support of City of Detroit, Michigan’s Statement of Qualifications Pursuant to Section 109(c) of the Bankruptcy Code* [Docket No. 11] Ex. A (the “Creditors Proposal”), at 48.)

35. Tellingly, in its analysis of the Barclays DIP, Moody’s also noted that, while “[c]orporate DIPs loans can support positive creditor outcomes . . . the impact of Detroit’s plan is uncertain.” (Ex. E, Moody’s Report at 2.) In fact, Moody’s concluded that “the ultimate creditor impact of Detroit’s financing proposal, assuming it is approved at both the state and federal level, is unclear given the multitude of contingencies that remain.” (*Id.*)

36. Accordingly, the City has failed to satisfy the requirement under section 364 of the Bankruptcy Code that postpetition financing be in the best interests of *both* the City and its creditors.

### **3. The Terms of the Barclays DIP Are Not Fair, Reasonable, and Adequate Given the Circumstances.**

37. Another factor that courts consider in evaluating postpetition financing is whether the terms of a proposed section 364 credit transaction are fair,

reasonable, and adequate given the circumstances. *In re Crouse Grp., Inc.*, 71 B.R. 544, 549 (Bankr. E.D. Pa. 1987).

38. The City is quick to point out the benefits of the Barclays DIP, but it is not as forthcoming in the DIP Motion as to the costs. Financial and transactional costs not discussed in the DIP Motion include (but are not limited to):

- A minimum 3.5% variable interest rate on the Barclays DIP that is subject to a market flex provision which could result in the actual minimum interest rate being as high as 6.5%;
- A one-time commitment fee in the amount of \$4.375 million even if the Barclays DIP is not approved; and
- A minimum exit financing fee in the amount of \$2.625 million even if the City refinances with an entity other than Barclays.

39. Further, the City has assumed that the present market value of the Swaps Termination Payment is \$290 million and that, by terminating the Swaps under the Forbearance Agreement at an 18% discount factor, it will achieve a \$52.2 million discount. (DIP Mot. ¶ 16.) The City asserts that “this fact alone supports a finding that the Postpetition Financing is in the best interests of the City.” (*Id.* ¶ 55.)

40. Although the Barclays DIP terminates on its own terms no more than two and one-half years after the closing date, no one — the City included — anticipates that the City will actually repay the Barclays DIP in full upon maturity from its own coffers. Instead, the City has signaled its intent to refinance the

Barclays DIP upon its exit from Chapter 9, thereby assuming additional financing costs (e.g., interest payments) well into the future. (*See* Ex. B, Exit Engagement Letter.) Yet the City has not disclosed any aspect of such costs — e.g., an estimated interest rate, maturity, and collateral package for an exit facility — the absence of which obscures the true costs of the Barclays DIP.

41. Finally, in addition to the foregoing, Syncora submits that the following changes should be made to the Proposed Order:<sup>7</sup>

- limiting the authority for the Purchaser, Indenture Trustee, and Bondholders to file and obtain documents to perfect their liens to only those actions that are “reasonably necessary” to perfect such liens (*see* Proposed Order ¶ 14);
- providing the City with the ability to cure an Event of Default (*see* Proposed Order ¶ 20);
- removing that “approval of the Post-Petition Facility by the [Loan] Board under Act 436 is not required to authorize the City to enter into the Bond Documents” (*see* Proposed Order ¶ G);<sup>8</sup>
- removing the City’s obligation to authorize its own advisors to cooperate with the Indenture Trustee (*see* Proposed Order ¶ 25);
- removing the limitations preventing the City from seeking additional postpetition financing that could be secured by the

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<sup>7</sup> Capitalized terms used in this paragraph have the meanings ascribed to them in the Proposed Order.

<sup>8</sup> Approval of the Barclays DIP by the Loan Board is required under section 36a of the Home Rule City Act and section 19(2) of P.A. 436. (*See* DIP Motion ¶ 42.) To the extent the Loan Board does not approve the Barclays DIP prior to the hearing on the DIP Motion, Syncora reserves the right to object to the DIP Motion on these grounds.

Collateral or that would have a senior or equal payment priority to the Quality of Life Bond or Swap Termination Bond (*see* Proposed Order ¶ 15; Bond Purchase Agreement § 7(d));

- removing the terms “indefeasible” and “indefeasibly” from paragraphs 15, 16, 19, 34, and 36 of the Proposed Order;
- stating that any liens granted pursuant to the DIP Motion attach when the Barclays DIP transaction closes as opposed to upon entry of an order (*see* Proposed Order ¶ 6);
- clarifying that any liens granted on any property pursuant to the DIP Motion extend only as far as the City’s property interest in the applicable property (e.g., only to the extent of the City’s contingent rights) at issue as determined by a final non-appealable order (*see* Proposed Order ¶ 6); and
- clarifying that a finding that the DIP lenders acted in “good faith” under section 364(e) of the Bankruptcy Code (and, to be clear, they have not) protects only the validity of the debt incurred and the liens granted pursuant to the DIP, but does not prevent any other transaction from being overturned in the event the order authorizing the DIP facility is approved (*see* Proposed Order ¶¶ 22-23).

#### **4. The Barclays DIP Should Not Be Approved Because Better Financing Is Available.**

42. When evaluating postpetition financing proposals, courts consider whether better alternatives are available. *Bland v. Farmworker Creditors*, 308 B.R. 109, 113–14 (S.D. Ga. 2003) (requiring that debtor show, among other things, that there are no “better offers, bids, or timely proposals are before the court”); *In re DB Capital Holdings, LLC*, 454 B.R. 804, 822 (Bankr. D. Colo. 2011) (same). Where better alternatives are available, courts have found that the proposed postpetition financing is not “fair, or reasonable, or adequate to the other Debtors



or to other creditors.” *See, e.g., In re Crouse Grp., Inc.*, 71 B.R. 544, 551 (Bankr. E.D. Pa. 1987).

43. As noted above, immediately after the City Council rejected the Barclays DIP, Syncora approached the City Council regarding an alternative proposal. After several days of discussions, Syncora submitted a proposal that improved upon the Barclays DIP in several material respects, including the following terms:

- a. A 20 basis point interest rate reduction, resulting in a net savings to the City of nearly \$1 million per year over the term of the loan;
- b. An option for the City to extend the termination date;
- c. No restriction on the City’s use of borrowed funds; and
- d. No Event of Default “if the City ceases to be under the control of an emergency manager for a period of thirty (30) days unless a Transition Advisory Board or consent agreement . . . shall have been established.”

(Ex. I, Syncora Proposal at 2.)

44. Although the City was made aware of this proposal, it makes no mention of it in the DIP Motion. Nor did it, at any point, approach Syncora to explore this proposal. Nevertheless, Syncora remains willing and able to provide the City with the funds sought under the Barclays DIP on more favorable terms. Accordingly, given that similar postpetition financing with better terms is available, the Barclays DIP should not be approved.

**5. The DIP Motion Should be Denied, and the Parties Are Not Entitled to a Good Faith Finding under Section 364(e) of the Bankruptcy Code, Because the Barclays DIP Violates Syncora's Rights and Applicable Michigan Law.**

45. Section 364(e) of the Bankruptcy Code provides that, in the absence of a stay pending appeal, a lender is protected from the effects of a reversal or modification on appeal of an authorization to obtain credit or incur debt under section 364, or of a grant of a priority or a lien in such a financing, if the lender acted in good faith. *E.g., New York Life Ins. Co. v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 901 F.2d 1359, 1364 (6th Cir. 1990) (“[T]he proper inquiry under § 364(e) is: (1) whether the creditor attempting to challenge authorization of credit obtains a stay pending appeal; and (2) whether the postpetition lender extends credit in good faith.”).

46. Here, the parties are not entitled to the requested section 364(e) good faith finding. In order for section 364(e) of the Bankruptcy Code to apply the Court must make an explicit finding of good faith. *Revco D.S.*, 901 F.2d at 1366 (holding that “an implicit finding of ‘good faith’ in a § 364(e) context is insufficient and that ‘good faith’ under that section should not be presumed”). No such finding can be made because, as set forth herein, the City has not provided the Court with sufficient information to determine whether or not the funds loaned under the Barclays DIP have in fact been extended in good faith.

47. Additionally, the parties are not entitled to a good faith finding because the funds sought will be used for improper purposes, namely the: (a) violation of Syncora's consent rights and the Waterfall (as defined below); and (b) circumvention of the requirements under section 36a of the Home Rule City Act and P.A. 436. "Where it is evident from the loan agreement itself that the transaction has an intended effect that is improper under the Bankruptcy Code, the lender is not in good faith." *In re EDC Holding Co.*, 676 F.2d 945, 948 (7th Cir. 1982); *Official Committee of Unsecured Creditors v. Goold Electronics Corp.*, 1993 WL 408366 (N.D. Ill. Sept. 23, 1993) (same); *see also In re Adams Apple, Inc.* (9th Cir. 1987) ("A creditor fails to act in good faith if it acts for an improper purpose."). Accordingly, both the DIP Motion and the requested good faith finding should be denied.

**a. The City Seeks to Use the Barclays DIP Proceeds for an Impermissible Purpose.**

48. As more fully set out in the Assumption Objection,<sup>9</sup> the Forbearance Agreement cannot be approved because the City seeks to eviscerate Syncora's third-party consent rights and rights to direct the Swap Counterparties in certain

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<sup>9</sup> *Objection of Syncora Guarantee Inc. and Syncora Capital Assurance Inc. to Motion of Debtor for Entry of an Order (I) Authorizing the Assumption of That Certain Forbearance and Optional Termination Agreement Pursuant to Section 365(A) of the Bankruptcy Code, (II) Approving Such Agreement Pursuant Rule 9019, and (III) Granting Related Relief* [Docket No. 366] (the "Forbearance Objection").

actions, as well as bypass a contracted-for priority payment scheme. *See, e.g.*, Assumption Objection ¶ 31; *In re Defender Drug Stores, Inc.*, 145 B.R. 312, 317–18 (B.A.P. 9th Cir. 1992) (examining the legality of a DIP enhancement fee provision and approving DIP where court was satisfied that “neither the extension order nor the enhancement fee, by themselves, enable [the lender] to control the actions of the debtor *nor prevent other parties from exercising their rights*”) (emphasis added). Notably, the City fails to address in the DIP Motion any of these critical problems or, for that matter, any other problems raised in the various other objections filed in response to the Assumption Motion.

49. Additionally, the Swap Termination Payment violates the priority hierarchy set forth in section 8.03 of the Service Contracts<sup>10</sup> (the “Waterfall”) and incorporated by section 14.14(a) of the Collateral Agreement. The Waterfall provides, in pertinent part, that payments made under the Service Contracts shall be made in the following order: interest on COPs and periodic Swap Payments; payments of COP principal; and finally, swap termination payments. (Service Contracts § 8.03.) Importantly, swap termination payments are *junior* to the payment of the outstanding principal and interest on the COPs. (*Id.*) Because the City defaulted on a \$40 million June 2013 COP-related principal and interest

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<sup>10</sup> Capitalized terms used in this paragraph and not otherwise defined herein have the meanings ascribed to them in the Forbearance Objection.

payment, Syncora paid approximately \$23.1 million to COP holders on account of its obligations as a COP insurer. As a result, Syncora is subrogated to the rights of the COP holders on account of the June 2013 missed payment, and likewise to the enforcement of the Waterfall with respect thereto. (Service Contracts T&C § 7.03) (“An Insurer making a Credit Insurance Payment shall be subrogated to the rights of Certificateholders . . . to receive the Related Service Payment and shall be entitled to exercise all rights and remedies that the Person to which it is the subrogee would have otherwise been entitled to exercise.”); (Trust Agreement T&C § 8.24) (same). Syncora is also entitled to enforce the Waterfall on account of its rights as a third-party beneficiary. (*See, e.g.*, Service Contracts T&C § 9.12 (providing that “Insurers are third party beneficiaries of the Service Contract[s]” with “the right to enforce the respective promises made in the Service Contract as if such promises were made directly to them”).) Since the City has not yet cured the June 2013 missed payment, making the Swap Termination Payment now would violate Syncora’s rights.<sup>11</sup> (Service Contracts § 9.12.)

50. The Waterfall is also protected by section 510(a) of the Bankruptcy Code, which is incorporated into Chapter 9 by section 901(a) of the Bankruptcy

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<sup>11</sup> It should also be noted that Syncora is not just a COP insurer — it is also a COP holder. As a result, when the City missed the June 2013 payment, Syncora also lost money—money that it will not be able to recover if the City is able to evade the Waterfall.

Code. Section 510(a) of the Bankruptcy Code provides that “[a] subordination agreement is enforceable . . . to the same extent that such agreement is enforceable under applicable non-bankruptcy law.” The Waterfall is a subordination agreement. *See, e.g., In re Holly’s, Inc.*, 140 B.R. 643, 668 (Bankr. W.D. Mich. 1992) (defining a subordination agreement to mean “a contract in which a creditor (the ‘subordinated’ or ‘junior’ creditor) agrees that the claims of specified senior creditors must be paid in full before any payment on the subordinated debt may be made to, and retained by, the subordinated creditor”); *In re Lantana Motel*, 124 B.R. 252, 255 (Bankr. S.D. Ohio 1990) (noting that subordination agreements provide “that subordinated creditor’s right to payments will be subordinated to rights of another claimant”). The City has not demonstrated that either the Service Contracts or the Waterfall are unenforceable under state law. Therefore, the Waterfall is equally enforceable in these proceedings, and the City’s proposal to violate such subordination agreement through the Barclays DIP should be denied.

**b. The City Has Not Complied with Michigan Law  
Regarding the Issuance of Financial Recovery Bonds.**

51. In addition, the City is attempting to circumvent the requirements of the P.A. 436. Under P.A. 436, the emergency manager must submit for City Council approval any action purporting to “sell, lease, convey, assign, or otherwise use or transfer the assets, liabilities, functions, or responsibilities of the local government.” Mich. Comp. Laws Ann. §§ 141.1552, 141.1559. After such a

proposal is submitted, the City Council has 10 days from the date of submission of the proposal to approve or disapprove the action. If disapproved, the City Council must, within seven days, propose an “alternative proposal that would yield substantially the same financial result as the action proposed by the emergency manager.” Mich. Comp. Laws Ann. § 141.1559.

52. On October 21, 2013, the City Council unanimously rejected the Barclays DIP. (*See* City Council Resolution.) As noted above, in its resolution, the City Council stated that “numerous questions have been submitted to the consultants and although some information has been provided, a host of uncertainties and unanswered questions remain” regarding the Barclays DIP. (*Id.* at 3.) One key piece of information that the City never provided to the City Council was the Barclays fee letter.

53. The failure of the City to provide the City Council with the Barclays fee letter had a material impact on the P.A. 436 process. To begin, it meant that the City deprived the City Council of all of the necessary information to understand and evaluate the economic terms of the Barclays DIP. In addition, the City Council could not effectively craft an “alternative proposal,” as it was required to do under P.A. 436, and implicitly offered a “no transaction” proposal instead. (Motion to Seal [Docket No. 1521] ¶ 3 (noting that Fee Letter “contains confidential commercial information regarding the potential cost to the City of the

financing and commercially sensitive detail regarding how to calculate such potential cost”).) Indeed, because the City Council had to make a proposal that would “yield substantially the same financial result” as the emergency manager’s proposal, the absence of the fee letter is in conflict with P.A. 436’s requirements.

## **II. The City’s Attempts to Hurriedly Rush Through a Series of One-Off Transactions Is an Attempt to Avoid Plan Confirmation Standards Designed to Protect Creditors.**

54. The DIP Motion is yet another example of the City asking the Court to approve plan-like transactions outside the plan of adjustment context. (*See also* Syncora Objection to PLA Motion [Docket No. 1557].) The reason for this is clear: the City realizes that it cannot meet the procedural and substantive plan confirmation requirements designed to protect creditors from precisely this kind of amorphous transaction. The DIP Motion is just the latest iteration.

55. The Bankruptcy Code prevents debtors from entering “into transactions that will, in effect, ‘short circuit the requirements of chapter 11 for confirmation of a reorganization plan.’” *In re Iridium Operating LLC*, 478 F.3d 452, 466 (2d Cir. 2007) (citations omitted). Such transactions often dictate the terms of a future plan of restructuring or alter creditors’ rights without otherwise requiring the satisfaction of the disclosure and confirmation standards of the Bankruptcy Code. *In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1983). It is well-established, however, that “a bankruptcy court cannot issue orders that



bypass the requirements of [the Bankruptcy Code], such as disclosure statements, voting, and a confirmed plan, and proceed to a direct reorganization.” *In re Swallen’s, Inc.*, 269 B.R. 634, 638 (B.A.P. 6th Cir. 2001). Although fashioned as a request for postpetition financing under section 364 of the Bankruptcy Code, the DIP Motion in reality seeks plan-like relief outside of the Chapter 9 confirmation process. *See e.g., In re Defender Drug Stores, Inc.*, 145 B.R. 312, 317 (B.A.P. 9th Cir. 1992) (“The bankruptcy court cannot, under the guise of section 364, approve financing arrangements that amount to a plan of reorganization but evade confirmation requirements.”).

56. As the City details in its DIP Motion, it intends to utilize the \$350 million in DIP Financing to terminate the Swaps and implement its restructuring plan set forth in the Creditors Proposal. While the City does not describe exactly what the Quality of Life Financing will be used for, it does emphatically state that these funds will “kick-start” its ten-year, \$1.25 billion reinvestment spending campaign. (DIP Mot. ¶¶ 21–22.) That is, before the City has even filed a plan of adjustment, it is asking the Court to approve what undoubtedly will be detailed in a “Means for Implementation of the Plan” section of the City’s forthcoming plan and related disclosure statement. To “kick-start” plan components pursuant to the DIP Motion puts the cart before the horse and directly circumvents the procedural and substantive safeguards Chapter 9 affords creditors. This approach is especially

problematic because the City intends to encumber previously unencumbered assets to fund the open-ended revitalization projects to the detriment of creditor recoveries.<sup>12</sup>

57. At minimum, the Court should evaluate the DIP Motion through the lens of plan confirmation requirements. In *Iridium*, for example, the Second Circuit held that it was appropriate to evaluate pre-plan transactions with an eye toward confirmation standards — in that case, the absolute priority rule. 478 F.3d 452, 463-64 (2d Cir. 2007). Here, even if the City is allowed to bypass the procedural safeguards (i.e., voting and “adequate disclosure”) relating to plan confirmation, the Court should nevertheless consider whether the City’s proposed course of action comports with certain substantive confirmation safeguards such as the “best interests of creditors” test. 11 U.S.C. § 943(b)(7).

58. For section 943(b)(7) purposes, “[t]he ‘best interest’ test has been described as a ‘floor requiring a reasonable effort at payment of creditors by the municipal debtor.’” *In re Pierce Cnty. Hous. Auth.*, 414 B.R. 702, 718 (Bankr. W.D. Wash. 2009) (citations omitted); *see also W. Coast Life Ins. Co. v. Merced Irrigation Dist.*, 114 F.2d 654, 678 (9th Cir. 1940) (noting that a plan is in “the best

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<sup>12</sup> As part of the plan of adjustment process, creditors will be receiving a recovery note or some other type of consideration that it paid out over time post-emergence. As a result, creditor returns will be subject to a number of risks, including the City’s long-term operations and revitalization implementation.

interests of creditors,” if the creditors’ recovery was “all that could reasonably be expected in all the existing circumstances”). In evaluating whether a plan of adjustment meets the “best interests of creditors” requirement, bankruptcy courts consider whether “the Plan affords all creditors the potential for the greatest economic return from Debtor’s assets.” *In re Barnwell Cnty. Hosp.*, 471 B.R. 849, 869 (Bankr. D.S.C. 2012). Here, however, the City has not yet valued its largest asset — the City’s art collection — nor has it determined the size of its pension and OPEB claims. This information is necessary to any assessment of what amounts are fairly available to the City and its creditors, and consequently, whether the DIP Motion meets the “best interests” test.<sup>13</sup>

59. Rather than step knowingly into the void, the Court should either defer consideration until the plan confirmation stage — or import plan confirmation safeguards into its consideration under section 364 of the Bankruptcy Code.

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<sup>13</sup> For these reasons, Syncora respectfully submits that certain case management protocols in respect of the plan confirmation process may be necessary to ensure that basic notions of due process are respected. Given the size, complexity, and speed of this Chapter 9 case, as well as the City’s failure to make any meaningful progress in respect of the foregoing open issues, Syncora reserves the right to seek appropriate relief insofar as the parties cannot reach agreement on a schedule forward.

**III. The Court Should Engage in a Fulsome Review of the DIP Motion with a Focus on Whether the City's Relief Requested Accords with the Purposes and Policies of Chapter 9.**

**A. The DIP Motion Should Be Evaluated in Reference to the Purposes and Policies of Chapter 9.**

60. One of the central issues in this case generally is the Court's authority to review the City's ability to allocate municipal funds to support its proposed public spending campaign. The City has made clear its view that the Court can have only a limited role in any such determination. According to the City, the Court has no authority to inquire into the how the City intends to use public funds or why it believes it needs them in the first instance. (Ex. D, Hr'g Tr. 19:21-23, Nov. 14, 2013, 14:36 ET ("That does not mean that this Court will sit in review of the city's business judgment on the underlying money that is needed.")) This narrow view, however, does not comport with the purposes and policies of Chapter 9 or, as a practical matter, with the analysis that the Court must perform when analyzing the City's proposed plan of adjustment.

61. As described in greater detail below, since Chapter 9's inception, both Congress and courts have consistently maintained that the primary purpose of Chapter 9 is to allow a municipal debtor to continue operations while it adjusts or refinances creditor claims with a minimum (or in many cases, no) loss to its creditors. Proposed transactions that diminish creditor recoveries thus must fairly balance creditors' reasonable expectations of minimal losses with a municipality's

need to continue operations. Those transactions and plans that unfairly favor public spending to the detriment of creditor recoveries violate the purpose and policies of Chapter 9 and fail to satisfy the “fair and equitable” and “best interests of creditors” tests that are pre-conditions to emergence.

62. Before a court can evaluate whether a proposed action comports with the standards of Chapter 9, a municipal debtor must demonstrate how it intends to treat creditors — a demonstration that, more often than not, occurs in the context of a plan confirmation proceeding. As a result, transactions, such as this one, that significantly affect creditors’ recoveries must be evaluated as part of, or at least in reference to, a plan of adjustment and the history and purposes of Chapter 9.

## **B. History of Chapter 9**

63. As noted above, the purpose and policies of Chapter 9 inform the standard that the Court should employ when reviewing the DIP Motion and any plan of adjustment it proposes. Thus, given the importance of Chapter 9’s purpose and policies, the following section summarizes the pertinent history of Chapter 9, highlighting the relevant legislative history and case law.

### **1. Congress Originally Enacted Chapter 9 to Facilitate Consensual Debt Adjustment Agreements with Majority Creditor Support.**

64. The concept of municipal bankruptcy in the United States first arose in 1934 in the midst of the Great Depression. *See generally, U.S. v. Bekins*, 304

U.S. 27, 53–54 (1938); *Ashton v. Cameron Cnty. Water Improvement Dist. No. 1*, 298 U.S. 513, 533–43 (1936) (Cardozo, J., dissenting).<sup>14</sup> During that time, municipalities were devastated by plummeting real estate values, disappearing tax receipts, and unsustainable debt service obligations. *Ashton*, 298 U.S. at 533–34 (Cardozo, J., dissenting). At the time, creditors of defaulting municipalities generally had no recourse except *mandamus* actions to compel the municipality to raise taxes. *Id.* at 534. In reality though, this remedy was “mere futility” given that tax resources were already maxed out. *Id.*

65. Out of options, defaulting municipalities and their creditors often entered into debt adjustment agreements. These agreements allowed defaulting municipalities to postpone payments and avoid legal action. *Id.*<sup>15</sup> At the same time, creditors — who realized that municipalities could not pay them back in full — believed that these agreements could maximize their recoveries. *Id.*

66. Though this strategy was initially successful, municipalities soon encountered the “holdout” problem — namely, when a small minority of objecting

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<sup>14</sup> See also H.R. Rep. No. 94-686, at 541–44 (1975) (discussing the purposes and history of Chapter 9); Omer Kimhi, *Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem*, 27 Yale J. on Reg. 351, 362–69 (2010) (discussing the history of Chapter 9); George H. Dession, *Municipal Debt Adjustment and the Supreme Court*, 46 Yale L.J. 199, 199-202 (1936) (discussing the historical context of the Municipal Bankruptcy Act of 1934).

<sup>15</sup> See also Kimhi, *supra* note 14, at 363.

creditors strategically resisted a negotiated debt readjustment agreement that had garnered majority creditor support. *See id.*<sup>16</sup> Holdouts were able to insist on, and sometimes even realized, payment in full. *See id.* Consequently, the majority of creditors who had been able to reach an agreement with municipalities ultimately refused to go forward with the restructuring, fearing that “to yield in one situation [would] encourage hold-outs in others.”<sup>17</sup> As a result, debt readjustment agreements no longer became a viable restructuring solution.

67. In response, Congress enacted Chapter 9 of the Bankruptcy Act, Municipal Bankruptcy Act of 1934, Pub. L. No. 251, 48 Stat. 798 (the “1934 Municipal Bankruptcy Act”), which authorized municipalities to file for bankruptcy and, under certain conditions, bind both consenting *and* dissenting creditors to the terms of a debt adjustment agreement. *See* 1934 Municipal Bankruptcy Act § 80(d). Municipal debtors and creditors alike welcomed the adoption of a process that was designed to make creditors as close to whole as possible and enabled municipalities to continue necessary operations.

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<sup>16</sup> *See also* Dession, *supra* note 14, at 203 (“The past few years yield numerous instances where settlements acceptable to an overwhelming majority were considerably delayed, if not upset completely, by relatively infinitesimal minorities.”)

<sup>17</sup> Dession, *supra* note 14, at 203.

68. Notably though, the scope of Chapter 9 was deliberately narrow, and crafted such that a municipality could not invoke Chapter 9 unless a majority of its creditors had previously agreed to a debt adjustment plan. *Id.* at § 80(a). In practice, this required municipal debtors to demonstrate that they faced genuine holdout problems. Where a municipality was able to demonstrate the requisite support, a plan of adjustment still required that (a) creditors holding at least 75% of the aggregate amount of indebtedness accept the plan, (b) it be “fair, equitable, and for the best interests of its creditors,” (c) it not “discriminate unfairly in favor of any class of creditors,” and (d) it be offered in good faith. *Id.* at § 80(d)-(e).

**2. Early Constitutional Challenges Illustrate that the Controlling Purpose of Chapter 9 Is to Provide a Forum Where Distressed Cities Can Meet with Creditors Under the Necessary Control and Assistance of the Judiciary in an Effort to Effect a Mutually Advantageous Adjustment of Their Debts.**

69. Shortly after its enactment the Supreme Court in *Ashton* struck down the Municipal Bankruptcy Act of 1934 as an unconstitutional exercise of federal control over the states in violation of the Tenth Amendment. 298 U.S. at 531.

70. In an oft-cited dissent, Justice Cardozo examined the history and purposes underlying Chapter 9. To begin, Justice Cardozo observed that Chapter 9 is like the rest of bankruptcy law in that it is a process to adjust the rights and obligations between a distressed debtor and its creditors. *Id.* at 542–43 (Cardozo, J. dissenting). He also examined the legislative history of Chapter 9 and concluded



that “[t]he controlling purpose of [Chapter 9] is to provide a forum where distressed cities . . . may meet with creditors under the necessary judicial control and assistance in an effort to effect an adjustment of their financial matters upon a plan deemed *mutually advantageous*.” *Id.* at 541 (emphasis added). Significantly, while Justice Cardozo’s articulations of the purpose and scope of Chapter 9 were offered in a dissent, they have been quoted approvingly by Congress, the courts, and advocates ever since.<sup>18</sup>

71. In an attempt to remedy the constitutional defects in the Municipal Bankruptcy Act of 1934, Congress passed the Municipal Bankruptcy Act of 1937, Pub. L. No. 302, 50 Stat. 653 (the “Municipal Bankruptcy Act of 1937”). Though this act contained material changes from its predecessor, it reaffirmed that a confirmable plan must be “fair, equitable, and for the best interests of the creditors and . . . not discriminate unfairly in favor of any creditor or class of creditors” and offered in good faith. Municipal Bankruptcy Act of 1937 § 83(e).

72. The constitutionality of the Municipal Bankruptcy Act of 1937 was immediately challenged and upheld in *Bekins*, which relied heavily on Justice

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<sup>18</sup> See, e.g., Ex. J, Hr’g Tr. 157:20-24, Oct. 15, 2013 (stating that Cardozo’s dissent is “very, very clear thinking, elegantly written about exactly the problem we have in this courtroom today, and I think it’s awfully persuasive . . .”); *id.* at 146:7-10 (“A very careful analysis of . . . the Cardozo dissent in *Ashton* is going to provide us with the guidepost to answer a lot of the questions that may not be constitutional questions but that are ultimately resolved by those cases.”).

Cardozo's dissent in *Ashton*. *U.S. v. Bekins*, 304 U.S. 27 (1938). To begin, the Court invoked Justice Cardozo's recitation that "the 'subject of bankruptcies' was nothing less than 'the subject of the relations between an insolvent or nonpaying debtor, and his creditors, extending to his and their relief.'" *Id.* at 47. The Court then quoted the same legislative record that Justice Cardozo relied upon in *Ashton*:

[Chapter 9] gives a forum to enable those distressed taxing agencies which are capable of reorganization, to meet their creditors under necessary judicial control and guidance and free from coercion, and to affect such adjustment on a plan determined to be mutually advantageous.

*Id.* at 51.

73. Building upon Justice Cardozo's dissent, *Bekins* laid the foundation for subsequent Chapter 9 jurisprudence. Significantly, it recognized that Chapter 9 was intended to provide distressed municipalities with a forum to negotiate mutually advantageous debt adjustment agreements that would allow for the municipality to survive and repay creditors as much as reasonably could be expected under the circumstances. Just as significantly, neither *Bekins* nor Justice Cardozo's dissent contemplate that Chapter 9 should be used as a means to implement a municipality's *unilateral* "renaissance" that is funded by substantial, non-consensual cuts to creditor recoveries.

**3. Early Applications of Chapter 9 Reaffirm That a Municipality's Plan of Adjustment Cannot Subsidize Public Improvement Projects at the Expense of Creditor Recoveries.**

74. Following *Bekins*, several distressed municipalities used Chapter 9 in an attempt to adjust their debt obligations. The early applications of Chapter 9 are notable in that they illustrate how courts carefully balanced a municipality's need to continue essential operations with its creditors' notions of fairness and a reasonable expectation of minimal losses.

75. For example, in *Fano v. Newport Heights Irrigation Dist.*, the court examined whether a municipality could, via a plan of adjustment, force its creditors to accept reduced recoveries and still satisfy the "fair and equitable" and "best interests of creditors" standards. 114 F.2d 563, 566 (9th Cir. 1940). In that case, a municipal irrigation district had defaulted on interest payments to its bondholders. *Id.* at 564. As part of the contested plan confirmation, the municipality argued that it was unable to collect sufficient taxes and thus could not satisfy its debt service obligations. In response, the bondholders argued that the missed interest payments resulted from the municipality's (a) failure to monetize certain assets and (b) excessive expenditures on repairs, maintenance, and construction of its irrigation system. *Id.* The evidence demonstrated that the municipality had not merely repaired and maintained its irrigation system, but had instead "practically rebuilt [the irrigation system] in a manner more substantial

than the original construction” and was, as the court described it, “top-heavy and extravagant . . . of at least twice the sheer necessity of the situation.” *Id.* at 565.

76. Though recognizing that the municipality did not have sufficient funds to meet its debt service obligations, the *Fano* court found that the deficit “has been caused by the reconstruction of the [irrigation] system and the diversion of tax moneys to the payment therefor.” *Id.* Additionally, the court found that the municipality owned certain unencumbered, non-monetized assets that exceeded the amount of its indebtedness as a result of such public improvement investments, and that “it would be highly unjust to allocate their cost to the bondholders.” *Id.* Based on these two pieces of the evidence — *i.e.*, the municipality’s excessive revitalization project and its failure to monetize certain assets — the *Fano* court ultimately held that the municipal debtor’s plan of adjustment was not fair, equitable, or in the best interest of the creditors. *Id.* at 564–66.

77. Latching on to the court’s comments surrounding the excessive refurbishing of the irrigation systems, commentators have interpreted *Fano* to stand for the proposition that a Chapter 9 plan is not fair and equitable if it provides for excessive investments in facility improvements to the detriment of creditors:

[A Chapter 9] plan that makes little or no effort to repay creditors over a reasonable period of time may not be in the best interest of creditors. For example, a debtor that had invested heavily in improvements in its facilities at a time when it was unable to pay the claims of its

bondholders cannot rely on its cash-poor position resulting from the investment as a reason why it should pay less to bondholders, because the bondholders should not be required in effect to subsidize the improvements. Such a plan is not fair and equitable and is not in the best interest of creditors.

6 *Collier* ¶ 943.03 (16th ed.).

78. In *Kelley v. Everglades Drainage Dist.*, the Supreme Court recognized that courts have a “duty of appraising [a plan’s] fairness, and of making the findings necessary to support such an appraisal.” 319 U.S. 415, 418 (1943). There, bondholders appealed the confirmation of a Chapter 9 plan on grounds of unfair discrimination. The *Kelley* court observed that the ultimate determination of fairness requires factual findings by the bankruptcy court:

In order that a court may determine the fairness of the total amount of cash or securities offered to creditors by the plan, the court must have before it data which will permit a reasonable, and hence an informed, estimate of the probable future revenues available for the satisfaction of creditors. And where, as here, different classes of creditors assert prior claims to different sources of revenue, there must be a determination of the extent to which each class is entitled to share in a particular source, and of the fairness of the allotment to each class in the light of the probable revenues to be anticipated from each source. To support such determinations, there must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion of fairness can rationally be predicated.

*Id.* at 420.

79. The *Fano* and *Kelley* courts recognized early in the history of Chapter 9 that municipal debtors carry the legal and evidentiary burden of demonstrating that plans are (a) fair and equitable, (b) in the best interests of creditors, and (c) not

unfairly discriminatory. In order to honor these holdings in the DIP Motion, the City must demonstrate that its proposed reinvestment spending, funded by reduced creditor recoveries, does not conflict with Chapter 9's mandate to minimize creditor losses to protect creditors from a municipal debtor's overreach; only by meeting these standards now will the City be assured that it can submit a confirmable plan.

**4. The 1976 and 1978 Amendments to Chapter 9 further reaffirm its first principles.**

80. For the next 40 years, Chapter 9 remained largely unchanged. In 1975, however, New York City experienced an economic crisis that brought about certain changes to Chapter 9. Recognizing that large municipalities could not access Chapter 9 because they could not secure support from 51% of their creditors prepetition, Congress enacted several amendments to Chapter 9 (collectively, the "1976 Amendments"). H.R. Rep. No. 94-686, at 543. When enacting these amendments, Congress explicitly stated that it intended "to follow current law as much as possible, in order that the [1976 Amendments] not be such a departure from settled principles that the changes would have an unsettling effect on other municipalities and their bondholders." *Id.* Congress also expressly reaffirmed that "the need for and the purpose of [Chapter 9] have remained unchanged in the 42 years since the first Municipal Bankruptcy Act [of 1934] was passed," quoting the same legislative history cited by Justice Cardozo in *Ashton* and the *Bekins* court:

The controlling purpose of [Chapter 9] is to provide a forum where distressed cities, counties, and minor political subdivisions . . . of their own volition, free from all coercion, may meet with their creditors under the necessary judicial control and assistance in an effort to effect an adjustment of their financial matters upon a plan deemed mutually advantageous.

*Id.* (citing H.R. Rep. No. 207, 73d Cong., 1st Sess. 1 (1933)).

81. The 1976 Amendments to Chapter 9 furthered this controlling purpose and made it more responsive to changes in municipal finance. For example, Congress made Chapter 9 more accessible by eliminating the prepetition majority support requirement in favor of an affirmative obligation to negotiate in good faith unless such negotiations prove impracticable. Additionally, Congress gave municipalities the opportunity to incur postpetition indebtedness with the expectation that such financing would improve creditor recoveries by ensuring that essential government services continue during the Chapter 9 case. With respect to postpetition financing, Congress reasoned that:

[B]y facilitating borrowing to meet current expenses, the court was actually preserving former secured creditors' collateral by preserving the business as a going entity. Thus, there was no actual or effective taking of property prohibited by the Fifth Amendment in giving new security that would prime the former liens of secured creditors. In the municipal context, this reasoning is similarly applicable. While the 'business' of government will continue whether it is insolvent or not, without cash to continue to provide essential government services, the only asset available for the creditors, the municipality's tax base, may be seriously eroded by flight of the city's businesses and residents.

H.R. Rep. 94-686, at 546–47.

Congress thus gave municipalities the ability to access postpetition financing to serve the dual purposes of Chapter 9 — survival of the municipality and minimizing creditor losses.

82. In 1978, Congress rolled out additional changes to Chapter 9 (the “1978 Amendments”) that were also not meant to modify its original purpose:

Chapter 9 provides a workable procedure so that a municipality of any size that has encountered financial difficulty may work with its creditors to adjust its debts . . . Chapter 9 provides essentially for federal court protection, and supervision of a settlement between the debtor municipality and a majority of its creditors. A municipal unit cannot liquidate its assets to satisfy its creditors totally and finally. Therefore, the primary purpose of Chapter 9 is to allow the municipal unit to continue operating while it adjusts or refinances creditor claims with minimum (and in many cases, no) loss to its creditors.

H.R. Rep. No. 95-595, at 6221 (1977).

83. The 1978 Amendments also reaffirmed Congress’s commitment that a Chapter 9 plan of adjustment must be offered in good faith, fair and equitable, in the best interests of the creditors, and not unfairly discriminatory in favor of any class of creditors.<sup>19</sup> Congress did, however, change the circumstances under which each test would be applied. Specifically, Congress incorporated a modernized “cram down” provision of Chapter 11 into Chapter 9 which enabled municipalities to confirm a plan of adjustment over the objection of a dissenting class of impaired

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<sup>19</sup> Compare 1934 Municipal Bankruptcy Act § 80(e), 1937 Municipal Bankruptcy Act § 83(e), and Pub. L. No. 94-260, § 94(b)(1), 90 Stat. 315 (1976), with Pub. L. No. 95-598, §§ 901(a), 943(b)(1), 1129(b)(1), 92 Stat. 2549 (1978).



creditors. Municipalities could only do so, however, if the plan was “fair and equitable” and did not “unfairly discriminate” in respect of such creditors. When describing the mutually advantageous aspects of “cram down” in the Chapter 11 context, Rep. Edwards reiterated that a plan still needed to satisfy the base-line standard of fairness:

For both debtors and creditors, the requirements for a reorganization plan are made more flexible, and the court is given the power to confirm the plan even though some creditors do not like the plan, so long as the plan meets certain statutory criteria of fairness. This is very important. ***This way creditors get more than if the business went into straight liquidation.***

124 Cong. Rec. H11, 699 (daily ed. Oct. 27, 1977) (statement of Rep. Edwards).

84. Put slightly differently, Congress did not intend “cram down” to alter the mutually advantageous nature of a Chapter 9 restructuring. To the contrary, Congress sought to enhance creditor recoveries through cram down. Indeed, the incorporation of cram down into Chapter 9 merely reaffirms the original maxim that a recalcitrant group of minority creditors should not be able to block an otherwise consensual, mutually advantageous debt adjustment agreement.

**5. The 1988 Amendments to Chapter 9 Underscore How Congress Intended the Chapter 9 Process to Balance Creditors' Reasonable Expectations of Minimal Losses with a Municipality's Need to Continue Essential Public Operations.**

85. In 1988, Congress enacted a series of amendments to Chapter 9 meant to balance creditors' reasonable expectations with a municipality's need to continue essential operations.<sup>20</sup>

86. In relevant part, Congress added section 928 of the Bankruptcy Code. Section 928(a) affords special protection to creditors holding prepetition liens on special revenues by authorizing the continuation of such liens on postpetition special revenue. Section 928(b), however, limits the scope of section 928(a) rights by prioritizing payments of "necessary operating expenses" in connection with the project or system generating the special revenues upon which a section 928(a) lien attaches. That is, section 928 of the Bankruptcy Code protects a creditor's rights to postpetition special revenues after subtracting the amount necessary to maintain "day-to-day expenses required to keep [the special revenue project] operating for the relatively short time between the filing of the [municipality's] bankruptcy and a

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<sup>20</sup> See Pub. L. No. 100-597, 102 Stat 3028 (1988); H.R. Rep. No. 100-1011, at 4116 (1988) ("Concern has been voiced in recent years that some of [Chapter 9's] general bankruptcy provisions—most prominently the avoidance under section 552(a) of the Bankruptcy Code of a lien resulting from a pre-petition security interest on property acquired post-petition—are inconsistent with the principles of municipal finance, particularly with respect to public works projects financed by revenue bonds.").

final resolution of its case.” *In re Jefferson Cnty., Ala.*, 482 B.R. 404, 439 (Bankr. N.D. Ala. 2012); *id.* at 437 (“From this legislative history, the following is part of the perimeter of what is contained within § 928(b)’s ‘necessary operating expenses.’ It includes for a given period of time those that are (1) expended to keep the system or project operating in the sense that the system or project is kept in good repair and generating the special revenues, ***not improvements or enhancement . . .***”) (emphasis added).

87. Section 928 is thus a microcosm of Congress’s intended creditor-debtor balance in Chapter 9. Section 928(a) evidences Congress’s intent to protect certain bargained-for, prepetition creditor expectations while section 928(b) represents Congress’s understanding that a municipal debtor must continue to expend resources — including special revenues subject to a section 928(a) lien — necessary to (i) continue delivering essential public services and (ii) maintain the applicable system to facilitate the repayment of certain creditors. What remains after subtracting section 928(b) (necessary operating expenses) from section 928(a) (prepetition creditor bargain) is arguably “all that the creditors can reasonably expect under the circumstances,” or that which is “fair and equitable” within the meaning of Chapter 9 plan confirmation jurisprudence. *Fano*, 114 F.2d at 565–66.

88. The legislative history surrounding section 928 underscores how Congress intended for Chapter 9 to be a mutually beneficial process that advanced

two distinct policy objectives: minimizing or eliminating creditor losses and the continued operation of the municipal debtor. In particular, Congress viewed the 928(b) necessary operating expense carve out “important because payment of operating expenses — those necessary to keep the project or system going — must be protected so that the project or system can be maintained in good condition to **repay bondholders** (and, importantly, to provide residents of the municipality with the service the project or system is meant to deliver).” H.R. Rep. No. 100-1011, at 4122 (emphasis added); *Jefferson Cnty.*, 482 B.R. at 441 (“The standard is that which allows a project or system to be in good condition to enable it to keep ‘going’ to ‘generate revenues to repay bondholders’ and to provide the services to the system’s or project’s customers.”). Congress believed that, once minimum necessary operating expenses are funded, municipal debtors should make creditors as close to whole as possible.

89. This framework is consistent with Chapter 9’s first principles whereby a Chapter 9 debtor must abide by its dual duties of continuing essential public operations while repaying creditors as much as possible under the circumstances — not sacrificing the latter in favor of a billion-dollar revitalization campaign. *See Jefferson Cnty.*, 482 B.R. at 437 (recognizing that “improvements or enhancements” to public projects or systems do not constitute “necessary operating expenses”). Indeed, Congress understood that without section 928 of the

Bankruptcy Code, certain creditors would “ultimately receive much less than they thought to be the value”<sup>21</sup> of their prepetition bargain, an outcome unfair to creditors that Congress sought to remedy. *See also In re Addison Cmty. Hosp. Auth.*, 175 B.R. 646, 650 (Bankr. E.D. Mich. 1994) (“The purpose of chapter 9 is to allow municipalities the opportunity to remain in existence through debt adjustment and obtain temporary relief from creditors.”).

**C. The City’s Approach Conflicts with the Purposes and Policies Behind Chapter 9.**

90. Thus far, the City has not exhibited any desire to work within the framework established by Chapter 9 and instead appears content to rush forward with a series of one-off transactions with plan-like implications. The allure of such a strategy is clear. If, by the time the City proposes its plan of adjustment, it has already allocated the majority of possible revenue, it will be able to move forward with its \$1.25 billion reinvestment without needing to allocate any money to creditor recovery. In so doing, however, the City will not be able to propose a plan of adjustment that is fair and equitable, and in the best interests of the creditors, meaning that the City may not be able to emerge from bankruptcy.

91. Obviously, the City does not believe it will be trapped in bankruptcy. Instead, its strategy is to pledge away its assets and revenue streams and then

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<sup>21</sup> H.R. Rep. No. 100-1011, at 4118.

determine what recoveries for creditors are fair by reference to what remains. In this way, fairness to creditors becomes a self-fulfilling prophecy — what is fair to creditors is what the City says is fair after it has finished spending money on itself. But Chapter 9 does not suggest that “fairness” is a subjective concept to be determined by the City, but rather an objective one to be determined by a bankruptcy court. And the Court cannot evaluate fairness without understanding how the City’s actions serve the dual purposes of Chapter 9: minimizing creditor losses and continued provision of necessary public services.

### **Conclusion**

92. For the foregoing reasons, Syncora respectfully respects that the Court deny the City’s motion to approve postpetition financing, granting liens and providing superpriority claim status, and modifying the automatic stay pursuant to sections 105, 362, 364(c)(1), 364(c)(2), 364(e), 364(f), 503, 507(a)(2), 904, 921, and 922 of the Bankruptcy Code.

*[Remainder of this page intentionally left blank]*

Dated: November 27, 2013

/s/ Ryan Blaine Bennett

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## Summary of Exhibits

Exhibit A - Hr'g Tr., Nov. 14, 2013, 11:01 ET

## Exhibit B - Exit Engagement Letter

Exhibit C - Email from Anne Marie Langan to Todd Snyder

Exhibit D - Hr'g Tr., Nov. 14, 2013, 14:36 ET

## Exhibit E - Moody's Report

Exhibit F - Funding for Detroit Announced on Sept. 27, 2013

## Exhibit G - Cash Flow Variance Report June 2013

## Exhibit H - Cash Flow Variance Report FY 2014

## Exhibit I - Syncora Proposal

Exhibit J - Hr'g Tr., Oct. 15, 2013



**Exhibit A**

**Hr'g Tr., Nov. 14, 2013, 11:01 ET**

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, . Docket No. 13-53846  
MICHIGAN, .  
. Detroit, Michigan  
. November 14, 2013  
Debtor. . 11:01 a.m.  
. . . . .

HEARING RE. DEBTOR'S MOTION PURSUANT TO SECTIONS 105  
AND 107(b) OF THE BANKRUPTCY CODE FOR AN ORDER  
AUTHORIZING THE DEBTOR TO FILE FEE LETTER UNDER SEAL IN  
CONNECTION WITH THE DEBTOR'S POST-PETITION FINANCING MOTION  
BEFORE THE HONORABLE STEVEN W. RHODES  
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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Proceedings recorded by electronic sound recording,  
transcript produced by transcription service.

24 MR. GORDON: Good morning, your Honor. Robert  
25 Gordon of Clark Hill on behalf of the Detroit Retirement

1 Systems.

2 MR. HACKNEY: Good morning, your Honor. Stephen  
3 Hackney on behalf of Syncora.

4 MR. NEAL: Good morning, your Honor. Guy Neal,  
5 Sidley Austin, on behalf of National Public Finance Guarantee  
6 Corporation.

7 MR. KOHN: Good morning, your Honor. Samuel Kohn of  
8 Chadbourne & Parke on behalf of Assured Guaranty Municipal  
9 Corp.

10 MS. NEVILLE: Good morning, your Honor. Carole  
11 Neville from Dentons on behalf of the Retiree Committee.

12 MS. CONNOR COHEN: Good morning, your Honor. Carol  
13 Connor Cohen from Arent Fox on behalf of Ambac Assurance  
14 Corporation.

15 MR. SHERWOOD: Good morning, your Honor. Jack  
16 Sherwood, Lowenstein Sandler, on behalf of AFSCME.

17 MR. HAMILTON: And on this side of the room, your  
18 Honor, Robert Hamilton of Jones Day on behalf of the City of  
19 Detroit.

20 MR. SLIFKIN: And good morning, your Honor. Daniel  
21 Slifkin of Cravath, Swaine & Moore on behalf of Barclays.

22 THE COURT: Okay. Go ahead, sir.

23 MR. ERENS: All right. This is the motion of the  
24 city to file under seal a fee letter in connection with the  
25 debtor's proposed post-petition financing under 107(b) of the

1 Bankruptcy Code and Rule 9018 as confidential commercial  
2 information of both the city and of Barclays. Barclays is,  
3 again, the proposed lender under the post-petition facility.

4           Your Honor, as we indicated in the seal motion,  
5 there are really two relevant parts of the fee letter.  
6 There's the provision that provides for so-called market  
7 flex, which is a provision that allowed Barclays in  
8 syndication of the loan, which they're entitled to do, to  
9 agree under limited circumstances to an increase of, among  
10 other things, the interest rate on the loan, and the point of  
11 sealing the fee letter is if that market flex or increased  
12 interest rate were publicly disclosed, parties who might be  
13 syndication parties, parties who would buy the loan in  
14 syndication, would know the amount of increase that Barclays  
15 could agree to and naturally would agree -- or excuse me --  
16 would request the maximum amount of the increase in the  
17 interest rate. That, of course, would cause the city to pay  
18 an increased interest rate under the loan if approved, so  
19 that is the reason, at least from the city's perspective, we  
20 would like that information to remain confidential.

21           The second part of the fee letter --

22           THE COURT: What is that potential increase?

23           MR. ERENS: I'm sorry.

24           THE COURT: What is that potential increase?

25           MR. ERENS: The amount? That is the -- that is

1 exactly the issue that the city would like to remain  
2 confidential because parties who might buy the loan right now  
3 know there is some increase but don't know how much, and so  
4 if you are a party thinking of participating in the loan and  
5 you knew the city and Barclays could agree to an increase in  
6 the amount of the interest rate of "X," let's just say, you  
7 would ask for "X."

8 THE COURT: Okay.

9 MR. ERENS: And the city obviously has a desire to  
10 keep the interest rate as low as possible.

11 The second part of the fee letter provides for the  
12 commitment fee that Barclays is owed in connection with  
13 arranging the loan. For reasons set forth in the seal motion  
14 and we can describe in more detail through testimony today,  
15 the disclosure of that fee also potentially could have the  
16 effect of increasing the cost of the loan to the city.  
17 Barclays also considers that information to be proprietary  
18 and, therefore, commercial -- confidential commercial  
19 information that the Court should protect it from disclosure  
20 pursuant to 907 -- excuse me -- 107(b) and 9018.

21 We have a variety of objections on the motion. I  
22 think it's important to note one thing, your Honor, because  
23 there may be some misconception among the objectors. The  
24 city is not seeking court approval of the commitment fee.  
25 Since 363 does not apply in a Chapter 9, the city has the



1 authority to pay the fee without court authority, and, in  
2 fact, as indicated in our underlying motion for the  
3 financing, which is up on the 10th, the city already has paid  
4 half of the fee and before that hearing will have paid the  
5 remainder of the fee. So as your Honor takes up the post-  
6 petition financing on the 10th or thereafter, there's a  
7 question as to how relevant that fee really will be because  
8 it will have been paid and will remain paid regardless of  
9 whether your Honor approves or does not approve the  
10 financing, so we thought it was important to clarify that  
11 point.

12 THE COURT: So the city is committed to pay this  
13 commitment fee whether the loan is approved or not?

14 MR. ERENS: That's correct. And the city has paid  
15 half of it and will pay the remainder prior to the hearing on  
16 the financing.

17 Another point, of course, which is implicit but we  
18 thought was important to mention at the beginning of the  
19 hearing, the city and Barclays, of course, are more than  
20 willing to share the fee letter with your Honor in camera.  
21 We have not done that yet but are happy to do so today.

22 Pursuant to your court's notice, we have brought  
23 witnesses for this hearing. We have a witness from Barclays,  
24 and we have a witness from the city or on behalf of the city,  
25 the witness from Miller Buckfire, the city's investment

1 banker. So unless your Honor has more questions or comments,  
2 we would propose we go directly to the direct testimony,  
3 which would begin with the Barclays witness.

4 THE COURT: Thank you. Stand by, please. Is there  
5 any objection to going straight to testimony here? All  
6 right. So as not to unduly extend these proceedings, I  
7 wonder if I could ask all of you who object to agree upon one  
8 of you to do the cross-examination. And what we'll do is  
9 we'll hear the testimony, and -- hold on. Hold on. What  
10 we'll do is we'll hear the testimony, and then we'll take a  
11 little break, and you can consult among yourselves and decide  
12 who's going to do it. Okay? Sir.

13 MR. SLIFKIN: May I proceed, your Honor?

14 THE COURT: Yes.

15 MR. SLIFKIN: Yes. Let me reintroduce myself. I'm  
16 Daniel Slifkin of Cravath, Swaine & Moore, and I represent  
17 Barclays.

18 THE COURT: And how do you spell that, sir?

19 MR. SLIFKIN: It's S for Sam l-i-f for Frank k-i-n,  
20 first name Daniel. And with the Court's permission, we would  
21 call Mr. James Saakvitne to the stand, and I'll spell that --

22 THE COURT: Okay.

23 MR. SLIFKIN: -- for you, too.

24 JAMES SAAKVITNE, WITNESS, SWORN

25 THE COURT: All right. Please sit down.

1 MR. SLIFKIN: May I, your Honor?

2 THE COURT: Yes, yes.

3 DIRECT EXAMINATION

4 BY MR. SLIFKIN:

5 Q Could you please state your name and spell it for the  
6 record?

7 A Sure. James Saakvitne, and that's spelled S like Sam  
8 a-a-k-v-i-t-n-e.

9 Q And do you go by Jay?

10 A Yes.

11 Q So, Mr. Saakvitne, by whom are you employed?

12 A By Barclays Capital.

13 Q And what is your position at Barclays?

14 A I'm a managing director and head of the municipal credit  
15 group.

16 Q Can you generally describe what your experience has been  
17 at Barclays in the financing area?

18 A Sure. So I've been at Barclays for a little over four  
19 years running the municipal credit group, and we provide  
20 loans, letters of credit, liquidity facilities to a range of  
21 municipal and not for profit entities. Right now the  
22 portfolio is approximately \$7 billion or about 70 clients.

23 Q And is municipal financing your sole focus?

24 A Yes.

25 Q Prior to Barclays, did you have previous experience in

1 this area?

2 A I did. I was at JPMorgan for 19 years, and the last 10  
3 years there I ran the municipal credit group, and while there  
4 we had a portfolio of about \$30 billion of likewise loans,  
5 liquidity facilities, letters of credit.

6 Q Okay. Now, let's focus on the proposed financing for the  
7 City of Detroit. Do you have a personal involvement in that  
8 transaction?

9 A I do.

10 Q For the benefit of the Court, could you describe  
11 generally what you did on the proposed transaction?

12 A Sure. So I was an integral part of the financing team.  
13 I was -- once we received the request from the city for  
14 proposals, I was involved in structuring and pricing and  
15 then, once we received the mandate, in negotiation, in  
16 working closely with lawyers on documentation, so I've been  
17 involved from the start from it.

18 Q And were you involved personally in negotiations with  
19 advisors for the city?

20 A Yes.

21 Q Now, is this, in your experience, a standard type of  
22 municipal deal?

23 A No. It's quite unique. It's the first ever post-  
24 petition financing for a municipality.

25 Q So what particular element is unusual, from your

1 perspective, of municipal financing?

2 A Well, this is really effectively a hybrid between a  
3 typical municipal credit deal secured by a revenue stream and  
4 by a post-petition financing where suddenly you're involved  
5 with other creditors, with Bankruptcy Court, this whole  
6 process, that is not typical for a municipal facility.

7 Q Did you -- do you have personal experience with respect  
8 to post-petition financing?

9 A Not prior to this transaction.

10 Q Okay. Did you pull in from within your colleagues at  
11 Barclays people with post-petition financing experience?

12 A Yes. Barclays is one of the top three providers of DIP  
13 financing, and we have a dedicated team, and we worked  
14 closely with them. They were very much a part of the team on  
15 this transaction.

16 Q How did Barclays become involved in this process?

17 A Like every investment bank involved in public finance,  
18 we've been following closely the situation in Detroit as it  
19 unfolded. In late August we were approached by Miller  
20 Buckfire saying that they were going to -- the city was going  
21 to be sending out a request for proposals for post-petition  
22 financing; that we would need to sign a nondisclosure  
23 agreement if we were going to receive that, so we did sign a  
24 nondisclosure agreement. We received the request for  
25 proposal in early September. We worked on it and then

1 submitted it in the middle of September.

2 Q Okay. Are you aware whether or not there were other  
3 bids?

4 A Well, certainly the press -- it's been talked about in  
5 the press that the city went out to approximately 30 or more  
6 different bidders, and then it's been in the press that  
7 supposedly there were 16 submissions.

8 Q Have you seen any of the other bids?

9 A No.

10 Q Did you see any of the other bids or anyone at Barclays  
11 see those bids during this process?

12 A Not at all.

13 Q Did Barclays share its bid with any of its competitors  
14 during this process?

15 A No.

16 Q Have you shared your bid with your competitors since the  
17 city signed the agreement with Barclays?

18 A No.

19 Q So, again, when did the city ultimately select Barclays'  
20 proposal?

21 A Well, it was a -- it was a bit of an iterative process,  
22 but the commitment letter itself was signed -- I want to say  
23 on October 6th. I may have that date off by a couple of  
24 days, but -- so it was -- basically that was the --

25 Q Okay.

1 A -- end of September, beginning of October.

2 Q Let me ask you a few questions about the terms of the  
3 agreement. I'm just going to ask you to answer these "yes"  
4 or "no" because while the question of confidentiality is sub  
5 judice, obviously we don't want to reveal anything while the  
6 Court is still deciding. So are you personally familiar with  
7 the fee letter which is the subject of today's hearing?

8 A Yes.

9 Q Okay. And are you familiar with the specific terms of  
10 that fee letter?

11 A Yes.

12 Q Are you familiar with the market flex term?

13 A Yes.

14 Q And are you familiar with the fee term?

15 A Yes.

16 Q Again, do you have an understanding of how Barclays  
17 calculated the fee that appears in the letter?

18 A Yes.

19 Q And let me just go back to a point that Mr. Erens made in  
20 his opening. Is it, in fact, your understanding that the fee  
21 is payable irrespective of whether the transaction is  
22 approved?

23 A Yes.

24 Q And has Barclay received 50 percent of that fee?

25 A We have.

1 Q Okay. So now let's turn to the market flex term. Just  
2 explain generally what a market flex term is.

3 A So market flex really came into the market, especially  
4 the corporate market, in the 1990s, and the idea is that when  
5 a financial institution agrees to underwrite a loan or a  
6 financing where they commit early on prior to the funding  
7 period but with the expectation that they're going to sell  
8 and distribute it, at the time when they give their initial  
9 pricing for the deal, they have an expectation for what the  
10 market is going to need to buy that piece of paper on the  
11 closing date whether the closing date be two weeks or four  
12 weeks or six weeks and then future. What market flex is  
13 doing is it's a provision that if the underwriter needs to  
14 change the terms of the deal so that they can actually  
15 successfully syndicate it on or around the pricing date, it  
16 gives them the ability to do that under certain parameters.  
17 So, for example, if the -- if it just turns out that they've  
18 misread the market or if there's been a widening in credit  
19 spreads in the interim, then, therefore, they can revise the  
20 market accordingly.

21 Q And does the proposed transaction with Barclays  
22 contemplate syndication?

23 A It does.

24 Q Okay. And what is Barclays' current intent with respect  
25 to syndication of the loan?



1 A We do plan to syndicate a portion of the loan.

2 Q Okay. Now, can market flex contain more than one  
3 particular provision?

4 A Certainly. It can be any range of terms which help  
5 enable the facility to be successfully marketed, syndicated.

6 Q And I take it that, in fact, the fee letter includes a  
7 market flex provision of some type?

8 A Yes.

9 Q Does that specific market flex provision at issue today  
10 include the possibility of the interest rate being adjusted  
11 upwards?

12 A It does.

13 Q In your experience, Mr. Saakvitne, are the details of  
14 market flex terms typically kept confidential?

15 A Yes, they are.

16 Q Why is that?

17 A They're kept confidential because if the market to whom  
18 we are trying to syndicate the facility or any underwriter is  
19 trying to syndicate the facility is aware of them, then they  
20 will demand those highest possible provisions. It's almost  
21 like if you decide you want to buy a car and you walk onto a  
22 car lot, you're not going to say to the car salesman, "Gee, I  
23 really like this car. I'm willing to pay \$15,000 for it, but  
24 let's start at 10,000, and let's see if you'll sell it to me  
25 for 10,000." Obviously the car salesman -- you've just shown

1 your hand, and the car salesman will say, "I'm sorry. The  
2 cost -- price on that car is 15,000." It's a very similar  
3 thing. We want to keep the provisions secret so that we can  
4 get the city the lowest cost.

5 Q Okay. So in the ordinary course, does Barclays itself  
6 seek to maintain the confidentiality of market flex terms?

7 A Absolutely.

8 Q Can you provide us with any examples of financings --  
9 recent financings where market flex was kept confidential?

10 A Sure. Just -- well, particularly within the DIP area,  
11 I'll just throw out a few names, which would be the Tribune;  
12 New Page, which is a paper company; Patriot Coal; and then  
13 ResCap, which was part of the financing vehicle for General  
14 Motors. Those were all ones where it was kept under seal,  
15 kept confidential.

16 Q Okay. Have you sought up till this hearing to maintain  
17 the confidentiality of the Detroit -- I'll call it the  
18 Detroit market flex provision?

19 A We have. Actually, in our commitment letter, we made  
20 provisions for the fee letter to remain confidential.

21 Q So you described generally what might happen with your  
22 car example if a market flex term is made public or at least  
23 available to competitors, people who might be in the  
24 syndicate, you know. Do you, in fact, have that fear in the  
25 case of Detroit?

1 A Yes, yes, absolutely, especially because in this  
2 situation there's no ongoing market precedent for what the  
3 correct pricing should be for a municipal DIP, so, therefore,  
4 it's very important for us to be able to control the  
5 information to be able to get the lowest possible price for  
6 the city.

7 Q Let me turn now to the fee provision in the letter. I  
8 take it there is provision for a specific fee in the letter.

9 A There is.

10 Q What does that fee cover?

11 A You know, the fee covers a number of things. It covers  
12 the risk that we are taking to -- where we're committing to  
13 fund the entire \$350 million. Even if the syndication fails  
14 completely, Barclays is still on the hook for the \$350  
15 million. It also covers the up front work we did on  
16 structuring the deal. We're paying our bank counsel out of  
17 that fee. It covers the work we're going to do on  
18 syndicating the deal, so it's -- and then it also -- some  
19 portion of it -- excuse me -- would be Barclays -- a portion  
20 of Barclays' profit on the overall transaction.

21 Q In your experience, are such fees, as you've described,  
22 typically kept confidential?

23 A They are.

24 Q Okay. And why is that?

25 A They're kept confidential because the banks who put

1 together syndicated deals -- typically it's part of their  
2 overall business strategy and business structure as to how  
3 they want to be compensated and how much they want in the up  
4 front fee versus how much they want in the ongoing running  
5 fee, et cetera, so it's part of the --

6 THE COURT: I'm sorry. How much they want in what?

7 THE WITNESS: I'm sorry. In the interest rate, in  
8 the ongoing running fee typically, so, yes, it is -- it's  
9 commercial information that we'd keep confidential.

10 BY MR. SLIFKIN:

11 Q And in the ordinary course, does Barclays keep that  
12 confidential?

13 A We do.

14 Q If this fee information were to be available to your  
15 competitors, how would that impact your business?

16 A Our concern is that it would put us at a competitive  
17 disadvantage because now going forward our competitors can  
18 say, "Ah, we know how much Barclays charges up front to  
19 provide a DIP like this," whether it be a corporate DIP or a  
20 municipal DIP, and that in a competitive situation -- and  
21 frequently these DIP financings are competitive situations --  
22 it will give our competitors a better ability to have an  
23 advantage over us because they know more about the black box  
24 of our pricing.

25 Q Does Barclays get to see its competitors' fee

1 information?

2 A No.

3 Q You also mentioned the methodology for determining fees.  
4 Is that also something that Barclays maintains  
5 confidentiality on?

6 A We do.

7 Q Okay. And why is that?

8 A Again, it just comes down to the more information you  
9 give about how our overall pricing works, the more possible  
10 it is for a competitor to break it apart and to tease it out  
11 and figure out and, therefore, give them a competitive  
12 advantage against Barclays.

13 Q Now, in some of the objections that were filed in  
14 response to the motion, there was a suggestion that the, in  
15 fact, municipal deals tend to be public. Is that correct, in  
16 your experience?

17 A Well, different components of municipal deals are, and  
18 that's where it's actually worth talking about sort of what  
19 kind of deal is this because, you know, for a typical  
20 municipal bond underwriting, the underwriting fees of the  
21 underwriter would be public, but this is not a public bond  
22 deal. This is a private placement, and it's really more akin  
23 to a traditional bank loan. Yes, we chose in our bid to  
24 structure it as a note instead of a loan. That was really  
25 more for booking purposes. To give you some examples, when

1 we provide a direct purchase of a loan, we don't make -- to a  
2 municipality, we don't make our fees public on that, nor do  
3 our competitors on their deal. Likewise, when I provide  
4 letters of credit and liquidity facilities on municipal  
5 bonds, we put the fees associated with those in a separate  
6 fee letter, and that fee letter is not disclosed to the  
7 public. And this is actually important because for municipal  
8 bonds the MSRB, which is the Municipal Securities Rulemaking  
9 Board, has very strict requirements under G-34 as to what has  
10 to be disclosed to investors, and they've come out and said,  
11 yes, the bank fees do not have to be disclosed. They're not  
12 posted on the website that MSRB maintains.

13 Q Do you have an understanding of whether fees are  
14 disclosed typically in DIP financing?

15 A I do have an understanding, and they are not typically  
16 disclosed.

17 Q Okay. With respect to the fees in the Detroit fee  
18 letter, the Detroit Barclays fee letter, in Barclays' view,  
19 could disclosure of that fee have an impact on the financing  
20 itself?

21 A We think that it could. It has the possibility -- in  
22 fact, I think more than the possibility -- the probability  
23 that investors, if they see the up front fee, are going to --  
24 when I say "investors," I mean the people to whom we're going  
25 to syndicate the loan -- will try to take a disproportional

1 share of that, and that would affect it.

2 Q Can you explain what you -- well, let me back up for a  
3 second. Are you personally familiar with negotiating with  
4 members of a syndicate?

5 A Yes. I've done that.

6 Q Okay. So explain to us how it is you think those  
7 negotiations would be affected by disclosure of the fees in  
8 the fee letter?

9 A So the way that the negotiations would be affected is  
10 that obviously any member of the syndicate wants to be --  
11 feel that they're being treated fairly. They want to feel as  
12 though they're getting similar compensation for the risk that  
13 they're taking from any other bank. If they see our up front  
14 fee, which, you know, I've talked earlier about the number of  
15 different things that that provides compensation for, then  
16 they can just determine, oh, well, we think that all of that  
17 should be allocated towards risk and not towards deal  
18 creation, administration, legal fees, et cetera, and that  
19 they would put in a demand for that whole up front fee, which  
20 really would not be -- it wouldn't make sense for Barclays to  
21 be able to share in that way.

22 Q Okay. There was some suggestion in opening that  
23 revealing the fee to members or potential members of the  
24 syndicate could raise the cost to the city. Do you agree  
25 with that or not?

1 A Well, I do agree because the reason for that is it really  
2 ties in with the market flex, and the risk is that if the  
3 syndicate members know the amount of the up front fee and if  
4 they then are told that they are not a -- we're not able to  
5 share that with them because it's being used to compensate us  
6 in other ways, that may put more -- give them more motivation  
7 to press for a higher interest rate, which would, therefore,  
8 increase the likelihood that we had to kick in on the market  
9 flex. It's almost like on a mortgage where the syndicate  
10 members -- it's like on a mortgage where if you get more --  
11 if you get lower points up front, then you have to pay a  
12 higher rate on your mortgage.

13 Q Does Barclays intend to, you know, share all of its  
14 commitment fee or all of its fees with the potential  
15 syndicate members?

16 A We wouldn't be able to share all of it because there are  
17 just a number of things which that up front fee compensates  
18 us for that these other syndicate people didn't do. That  
19 being said, we may or may not choose to share some of it.  
20 We'll just have to see how the syndication goes.

21 Q Would you share all of it?

22 A No.

23 Q How likely do you think it is that were the fee to be  
24 revealed, the market flex provision would kick in and the  
25 rate to the city would be higher?



1 A I think it's definitely an increased probability. As to  
2 how likely, I'm not sure.

3 Q Okay. Fair enough. When Barclays entered into the  
4 agreement with the city, did you have an expectation as to  
5 whether the fee would be made public?

6 A We fully expected that it -- we certainly expected that  
7 it would not be made public.

8 Q And did you do anything -- did you do anything to protect  
9 yourself in that regard?

10 A We did actually. We put in the commitment letter that  
11 the fee letter would remain confidential and that the city  
12 would take efforts to have the fee letter be under seal.

13 Q Had you been told prior to entering into this transaction  
14 that, in fact, the fee would be made public, would that have  
15 affected your approach to the transaction at all?

16 A Very much. We actually -- it would have very much raised  
17 the possibility that we would not have chosen to submit a  
18 bid. If we did choose to submit a bid, we would have almost  
19 certainly increased the up front fee.

20 Q Okay. Now, you've told us about competitive advantages.  
21 You've told us about confidentiality. You explained the  
22 potential impact on the city. Is there anything else, in  
23 your view, that -- any other impact that may result from the  
24 commitment fee being made public?

25 A I believe there is actually, and I think that it's a more

1 macro impact. The corporate DIP financing field is certainly  
2 an active one, and it's one where lenders choose to lend to  
3 corporate DIP's because they -- there's a history of fees  
4 being kept confidential. This is the first muni post-  
5 petition financing. I hope very much it's the last one in a  
6 long time, but if it's not, we certainly want to keep the  
7 field open so that if there is a demand for future municipal  
8 post-petition financings, that financial institutions will be  
9 motivated to bid, and part of their motivation is knowing  
10 that their fees will be confidential.

11 MR. SLIFKIN: Thank you very much. I have no  
12 further questions at this time, your Honor.

13 THE COURT: All right. We'll reconvene at 11:40 for  
14 cross-examination.

15 THE CLERK: All rise. Court is in recess.

16 (Recess at 11:31 a.m., until 11:40 a.m.)

17 THE CLERK: All rise. Court is in session. Please  
18 be seated. Recalling Case Number 13-53846, City of Detroit,  
19 Michigan.

20 THE COURT: Go ahead, sir.

21 MR. SHERWOOD: Your Honor, Jack Sherwood, for the  
22 record, from Lowenstein Sandler, counsel for AFSCME, and I  
23 have been asked to try to coordinate our cross-examination.

24 THE COURT: Okay. Thank you, sir.

25 CROSS-EXAMINATION

1 BY MR. SHERWOOD:

2 Q Mr. Saakvitne, is that right?

3 A Yes.

4 Q How's that?

5 A Okay.

6 Q Let me start by asking about some of the precedent that  
7 you talked about on direct. I think you mentioned the ResCap  
8 case and Patriot Coal; correct?

9 A Yes. Yes, that's right.

10 Q And those were two Chapter 11 bankruptcy situations where  
11 the fee letters were kept private. Was that your testimony?

12 A That's correct.

13 Q Are you aware that in both of those cases the fee letters  
14 were actually filed on the docket of the bankruptcy case with  
15 certain terms redacted?

16 A I wasn't aware of that, but -- so, no, I wasn't aware of  
17 that.

18 Q Okay. And were you also aware that in both of those  
19 cases, the debtor and the DIP lender disclosed the aggregate  
20 amount of fees that they were charging in connection with the  
21 loan?

22 A I'm not aware of that.

23 Q But you are aware that in this case Barclays is not  
24 willing to disclose the aggregate amount of its fees and has  
25 not done so in connection with this loan?

1 A That's correct.

2 Q And are you aware that in the ResCap case before Judge  
3 Glenn in the Southern District of New York that Barclays was  
4 the DIP lender?

5 A Yes, I am aware.

6 Q And did you do any review of the Barclays order or the  
7 Barclay -- I'm sorry -- the ResCap order or the ResCap docket  
8 in preparation for your testimony today?

9 A No, I did not.

10 Q Are you also aware that in both ResCap and Patriot  
11 Coal -- now, do you know Patriot Coal was a Southern District  
12 of New York case, too; correct?

13 A I wasn't involved in that, so --

14 Q Okay. In both of those cases --

15 THE COURT: Wasn't venue transferred?

16 MR. SHERWOOD: Yeah. That was -- it was Judge --  
17 but I think Judge Chapman signed the order, for the record,  
18 in Patriot Coal. There was a famous opinion on venue in that  
19 case.

20 THE COURT: So maybe that was after the DIP  
21 financing?

22 MR. SHERWOOD: I believe so because I -- and just  
23 for the record, your Honor, both of the orders that were  
24 cited with docket number in the city's brief are available  
25 for public consumption.

1 BY MR. SHERWOOD:

2 Q So in this case, Barclays is not even prepared to  
3 disclose its aggregate fees; correct?

4 A That's correct.

5 Q And it's certainly not willing to post its fee letter on  
6 the Court's docket; correct?

7 A I believe that's correct. We're asking that it be under  
8 seal, so --

9 Q Okay. Are you familiar with the types of fees that were  
10 charged by Barclays in the ResCap case?

11 A No, I'm not.

12 Q Well, in looking at those, there's reference to a  
13 structuring fee, an underwriting fee, a work fee, an agency  
14 fee, three types of up front fees, and collateral agency  
15 fees. Do those terms sound familiar to you?

16 A They do.

17 Q Now, on direct you talked about getting 50 percent of  
18 your fee in this case; correct?

19 A Paid already, yes. That's correct.

20 Q Okay. You've gotten paid. Is that the only type of fee  
21 that Barclays is getting in connection with this proposed DIP  
22 financing?

23 A The up front fee? I'm sorry. Can you -- I don't quite  
24 understand your question. I'm sorry.

25 Q Well, it's hard because I don't have the fee letter, so

1 I'm just trying to, you know, work off of your testimony, and  
2 there was testimony about your -- you having been paid 50  
3 percent of a fee.

4 A There's only one fee of which we've received 50 percent.  
5 Is that -- I hope I'm answering your question.

6 Q Okay. So without disclosing the terms of the fee letter,  
7 are you saying that there is one fee and one fee only that is  
8 payable to Barclays in connection with this proposed  
9 facility, and you've received half of that?

10 A That's correct.

11 Q And is that the only fee that Barclays will be entitled  
12 to collect during the entire course of the DIP loan?

13 A That is correct.

14 Q Okay. So there's no -- so is there a difference between  
15 a structuring fee and an underwriting fee?

16 A There --

17 Q Let me -- what's that fee called? What are you calling  
18 that fee under this deal?

19 A We're calling that fee the commitment fee.

20 Q Okay.

21 A The reality is that it covers a whole number of different  
22 tasks and risks, et cetera. We chose not to subdivide it  
23 into four or five separate fees. We could have, but we just  
24 kept it simple and just called it one fee.

25 Q And in addition to that fee, is Barclays entitled to

1 reimbursement of expenses?

2 A We are paying bank counsel fee, legal fees out of pocket,  
3 out of our own pocket.

4 THE COURT: Answer the question "yes" or "no."

5 THE WITNESS: I'm sorry. Can you repeat the  
6 question because I just want to make sure I get it right?

7 BY MR. SHERWOOD:

8 Q In addition to the commitment fee that we spoke of, is  
9 Barclays entitled to reimbursement for its out-of-pocket fees  
10 and expenses from the city?

11 A Yes.

12 Q Okay. So the commitment fee that we spoke of does not  
13 include reimbursement of out-of-pocket fees and expenses to  
14 Barclays; correct?

15 A Correct.

16 Q And has a projection been done and delivered to the city  
17 of what those out-of-pocket fees and -- let's just say  
18 expenses will be?

19 A No.

20 Q And those --

21 THE COURT: Excuse me. I have to ask what the  
22 relevance of this is to whether the fee letter itself should  
23 be confidential.

24 MR. SHERWOOD: I just wanted to get an idea of what  
25 the total universe of fees that we're not knowing about might

1 be, and I think I'm pretty much -- I think I've gotten my  
2 answer.

3 THE COURT: Okay.

4 BY MR. SHERWOOD:

5 Q You'd agree, would you not, that in determining the  
6 reasonableness of a financing commitment, that the level of  
7 fees being charged is relevant to that determination?

8 A Yes.

9 Q And that was certainly considered by the city in its  
10 decision of whether or not to choose Barclays as its lender  
11 in this case?

12 A I would assume so.

13 Q Now, I think you said on direct that in a Chapter 11  
14 context, the standing operating procedure is for a DIP lender  
15 to not disclose its fees?

16 A That's my understanding.

17 Q And that's not based on your experience, though, because  
18 I think you testified that you're kind of new to the DIP  
19 lending world, and your experience is in the non-bankruptcy  
20 municipal finance world; is that right?

21 A That's right.

22 Q So that testimony is based on understandings that you got  
23 from some of your colleagues at Barclays? Is that fair to  
24 say?

25 A Yes. That's right.



1 Q And are you based in -- where are you based?

2 A New York.

3 Q Okay. And Barclays has substantial experience lending on  
4 a DIP basis in the Southern District of New York. Is that  
5 fair to say?

6 A That's my understanding.

7 Q Would it surprise you to learn that under the local rules  
8 of the Southern District of New York that all pricing and  
9 economic terms including fees, commitment fees and any other  
10 fees, are required to be disclosed in any DIP financing  
11 application?

12 A That would surprise me.

13 THE COURT: Is your representation accurate,  
14 counsel?

15 MR. SHERWOOD: Local Rule 4001-2, contents of a DIP  
16 motion, added to the provisions set forth in Bankruptcy Rule  
17 4001(b)(1)(B) and (c)(1)(B) and (d)(1)(B), Item 3, "pricing  
18 and economic terms, including letter of credit fees,  
19 commitment fees, any other fees, and the treatment of costs  
20 and expenses of the lender, any agent of the lender, and  
21 their respective professionals." I just read from the local  
22 rules for the Southern District of New York.

23 BY MR. SHERWOOD:

24 Q Would you agree that the standard practice for DIP loans  
25 in a Chapter 11 context outside of Chapter 9, Chapter 11

1 context, is that the DIP lender must fully disclose all of  
2 its fees that it's charging in connection with a loan as part  
3 of the application that it files with the Court?

4 A That's not consistent with what I've been told by my  
5 colleagues.

6 Q Have you learned anything from your colleagues about  
7 their experience in dealing with creditors' committees in  
8 Chapter 11?

9 A Yes.

10 Q And is it your understanding that in a typical Chapter 11  
11 case where there is an unsecured creditors' committee and the  
12 debtor is looking to get a DIP loan, that the committee and  
13 its professionals are very concerned about the fees being  
14 paid by the estate in order to secure that DIP loan?

15 A Yes.

16 Q And in that situation, is it also commonplace for the  
17 debtor to fully disclose all fees, expenses, charges, et  
18 cetera, being paid by the debtor as part of that DIP  
19 facility?

20 MR. SLIFKIN: Objection, your Honor. To whom?  
21 Fully disclosed to whom?

22 MR. SHERWOOD: To the creditors' committee.

23 THE WITNESS: It's my understanding that Barclays  
24 frequently does that for professional eyes.

25 THE COURT: For professional what?

1 THE WITNESS: I'm sorry. Professional eyes only.

2 BY MR. SHERWOOD:

3 Q Let me ask you about your testimony with respect to your  
4 expectation that the terms of the fee letter will remain  
5 confidential. Do you remember that testimony?

6 A Um-hmm, I do.

7 Q Okay. Isn't it true that the commitment letter provides  
8 that the confidentiality obligation on the part of the city  
9 is qualified in some respects?

10 A Yes. We -- yes.

11 Q Okay. And one of those qualifications is to the extent  
12 required by applicable law.

13 A Yes.

14 Q And are you familiar with that language?

15 A Um-hmm.

16 Q And another qualifier is as required by the Bankruptcy  
17 Court. Would you agree that that's a qualifier under the  
18 commitment letter?

19 A I would.

20 Q Okay. And I think also in the commitment letter there is  
21 an agreement by the city to limit its disclosures to the  
22 minimum necessary in seeking approval of the transaction;  
23 correct?

24 A Yes.

25 Q So that is the extent of the committee's commitment to

1 Barclays with respect to confidentiality. It is to try to  
2 limit the disclosures to the minimum necessary in seeking  
3 approval of this transaction; true?

4 A True.

5 Q Okay. And to the extent that the Bankruptcy Court or  
6 applicable law requires the city to disclose the fee letter,  
7 then they did their best, and that's okay; right? Isn't that  
8 the terms of the deal?

9 A That's the terms of the deal.

10 Q So to the extent that applicable law or a Bankruptcy  
11 Court requires disclosure, it's not like the financing is  
12 going away.

13 A Correct.

14 Q Fair?

15 A Correct.

16 Q Now, in terms of syndication, I believe the commitment  
17 letter says that Barclays reserves the right to do a  
18 syndication after the deal is approved. Fair?

19 A That's correct.

20 Q So Barclays is not obligated to try to syndicate this  
21 loan; true?

22 A Correct.

23 Q Now, I know you testified that it's your intention, but  
24 it's certainly not Barclays' obligation. And if the  
25 syndication fails, Barclays is still committed; true?

1 A That's correct.

2 Q In paragraph 1 of the commitment letter, Barclays is  
3 described as the sole lead arranger, sole bookrunner, sole  
4 syndication agent. Those terms mean anything --

5 A Yes.

6 Q -- to you? Yes?

7 A Yes.

8 Q What is all that? Can you just give one sentence on what  
9 a sole lead arranger is, a sole bookrunner, a sole  
10 syndication agent?

11 A Sure. The sole lead arranger basically means we  
12 structure the deal ourselves. The sole bookrunner sort of  
13 ties in with sole syndication agent meaning that we're the  
14 one who will go out and find other lenders for the deal, and  
15 the sole underwriter means that we're the sole entity who  
16 says at the time of the commitment letter, we will write you  
17 a check for \$350 million regardless of whether or not we're  
18 successful on the syndication.

19 Q And all of Barclays' roles -- they don't get separate  
20 fees for each role. They're all -- all those roles are  
21 satisfied by the one fee; right?

22 A That's correct.

23 Q Okay. So, now, Barclays -- you were competing with, say,  
24 15 other potential DIP lenders in this transaction; isn't  
25 that right?

1 A That's what the press has said, that there were a total  
2 of 16 submissions.

3 Q Okay. So you knew when you were making your submission  
4 to the city that the city was comparing your terms and  
5 conditions with many others.

6 A We expected that to be the case.

7 Q And you expected that your fees, right, your fee letter  
8 would be compared with the fee letters of these many other --

9 A Yes.

10 Q -- prospective lenders? And you knew during this process  
11 that the city was looking for the best terms of pricing;  
12 right?

13 A That was our expectation.

14 Q And pricing in this context is sort of a combination of  
15 interest rate and fees; right?

16 A Yes. That's correct.

17 Q Is there anything else that would be included in pricing  
18 of a loan of this type?

19 A Not really in pricing. I was just going to say there  
20 could be other terms that the city might take into account.

21 Q Nonfinancial terms.

22 A Correct.

23 Q Okay. So -- but in terms of the financial terms, the key  
24 ones are interest rate and fees --

25 A Correct. That's right.

1 Q -- right? So if the fees are really high but the  
2 interest rate is low, that doesn't necessarily mean that, you  
3 know, the pricing is good?

4 A That's right.

5 Q Okay. Now, in the DIP loan application that the city  
6 filed, interest is disclosed at LIBOR plus 250 basis points  
7 or three and a half percent. Are you familiar with that  
8 disclosure by the city in the motion?

9 A Yes.

10 Q And that sounds right to you; right?

11 A Yes.

12 Q Now, and Barclays has committed to provide a loan at that  
13 interest rate, have they not?

14 A Subject to the market flex.

15 Q Subject to the market flex. Okay. So I want to kind of  
16 understand that. Well, let me just -- in the motion the city  
17 says if the market flex provisions are exercised, the pricing  
18 on the DIP will still be below what is typical for a DIP  
19 financing. Do you agree with that statement?

20 A DIP financings can be priced all over the place depending  
21 on the situation, so I'm not sure by what standard they're  
22 comparing that against.

23 Q Okay. I'm just representing to you that that was said by  
24 the city's investment banker, Miller Buckfire, in paragraph  
25 10 of his declaration. I want to know whether you agree or

1 disagree with that.

2 A It's hard to agree or disagree.

3 Q Okay.

4 A It's not --

5 Q So does the -- so the market flex term of the -- is that  
6 contained in the fee letter?

7 A That's right.

8 Q And it's nowhere else in the loan documents, to your  
9 knowledge?

10 A That's correct.

11 Q Okay. And this term gives Barclays the right to raise  
12 the interest a little bit?

13 A That's correct.

14 Q And --

15 MR. SLIFKIN: Your Honor, I just want to -- I'm sure  
16 you're aware of this, but we're getting pretty close to  
17 disclosing the -- asking to disclose the information that is  
18 sub judice.

19 MR. SHERWOOD: I think the Court asked that  
20 question, and I understand that you're not going to give me  
21 the level of flexibility --

22 THE COURT: I permitted the question because the  
23 phrase "a little bit" is so vague as to be meaningless.

24 MR. SLIFKIN: Thank you, your Honor.

25 BY MR. SHERWOOD:



1 Q So I guess what -- just to summarize what we can  
2 understand now, you know, based on not seeing the fee letter  
3 or the -- or understanding the market flex provision, at this  
4 point Barclays has made a commitment to make a loan to the  
5 city for -- at a rate of three and a half percent with sort  
6 of this caveat that that three and a half percent might be  
7 bumped up a bit if this market flex provision has to kick in.  
8 Is that fair?

9 A That's fair.

10 Q And do you consider it confidential to -- or does the  
11 market -- does the fee letter contain provisions that say  
12 when the market flex provision is going to kick in?

13 MR. SLIFKIN: Your Honor, can I ask that to be  
14 answered "yes" or "no"?

15 MR. SHERWOOD: That's all I was looking for, your  
16 Honor.

17 THE WITNESS: Yes, it does.

18 BY MR. SHERWOOD:

19 Q Okay. I just want to understand what the moving parts  
20 are on the market flex provision, and I think -- I'm assuming  
21 that it's -- you know, when it kicks in and then if it kicks  
22 in, how much. Yes?

23 A Yes.

24 Q Now, you'd agree that to the extent that Barclays cannot  
25 syndicate this loan, Barclays is still on the hook for the

1 entire amount of the DIP loan.

2 A Yes.

3 Q And in terms of -- in terms of Barclays' desire to keep  
4 these terms confidential, is it fair to say that you want to  
5 do this so that you have an advantage in your negotiations  
6 with the potential parties that you're negotiating with on  
7 the syndication?

8 A We want to do it to give the city the lowest possible  
9 interest rate so that, therefore, it's the city's advantage  
10 relative to the parties who are negotiating. It's really  
11 between the -- it's ultimately between the city and the  
12 lenders, not between Barclays and the lenders.

13 Q Well, it's also in Barclays' favor because to the extent  
14 that Barclays does not have to give away some of its fees in  
15 connection with this case to someone else in the syndication,  
16 Barclays gets to keep those. It's not going to give them  
17 back to the city, is it?

18 A No, we won't.

19 Q Okay. So it is in Barclays' advantage to not have the  
20 potential syndicate lenders know what Barclays is getting in  
21 terms of the gross fee in this case; true?

22 A I'm not sure I do agree just because there's only a  
23 certain amount of the fee that we would be able to -- or  
24 willing to choose to give up without being fairly compensated  
25 for what we have provided to date and that, therefore,

1 anything beyond that would really -- would be more likely to  
2 tie into the market flex than the interest rate.

3 Q All right. But let's say that I'm a prospective  
4 syndicator and I'm going to buy half of this loan, and I know  
5 that you have "X" amount of dollars over and above your cost  
6 that you've -- you're obviously not going to give away to  
7 play with. I'm going to say give me half of that. I mean  
8 that would be my position because I know what you have in  
9 terms of excess. I know what your profit is for the  
10 commitment.

11 A Well, but you wouldn't know what our costs were out of  
12 the up front fee. It would be a random choice on your side  
13 as to how much of that is appropriate for Barclays to keep  
14 and how much should be shared in the syndication. There's no  
15 formula for that.

16 Q Does the fee letter distinguish between -- does the fee  
17 letter -- and you can answer this "yes" or "no," and I'll  
18 give you guys a chance to object, but does the fee letter --  
19 if I read the fee letter right, would I be able to determine  
20 how much Barclays' actual costs were by just reading that fee  
21 letter?

22 A No.

23 Q I think you said something about -- on direct about in  
24 the municipal finance context that fees are routinely not  
25 disclosed. Is that fair to say?

1 A Bank fees --

2 Q Bank fees.

3 A -- are routinely not disclosed whether it be for a loan  
4 or a letter of credit enhancing municipal bonds, et cetera.

5 Q Are fees of lenders who do business with a city or a  
6 state or county -- are those fees disclosed in any contexts?

7 A Not typically.

8 Q Can they be learned through like Freedom of Information  
9 Act? If I went to -- filed a Freedom of Information Act  
10 request, could I be able to learn how much my city or town or  
11 state is paying to its lenders on bond issuances and so  
12 forth?

13 A I'm just not sure. I don't know enough about the Freedom  
14 of Information Act.

15 Q Do you know what MSRB is?

16 A Absolutely, yes. I think I referenced it in my  
17 testimony.

18 Q I think you did, too. Can you just tell me what that  
19 means, what that acronym stands for?

20 A Oh, sure. It's the Municipal Securities Rulemaking  
21 Board.

22 Q Okay. And is it your testimony that that board prohibits  
23 the disclosure of underwriting fees?

24 A No. I don't think that's what I said. I think what I  
25 said was that -- first of all, was that they permit that the

1 fees paid to banks for credit facilities do not have to be  
2 disclosed so that, therefore, on their website, which is the  
3 EMMA website, we'll post a letter of credit. We'll post  
4 reimbursement agreement, standby bond purchase agreement, but  
5 we'll have the fees in a separate fee letter, and that is not  
6 posted.

7 Q Okay. It says they don't have to be disclosed. It  
8 doesn't mean that they're never disclosed.

9 A Correct.

10 Q You also testified, I think, at the end that it was your  
11 expectation that this fee letter would be kept private and  
12 that had you known that the fee letter would be public, you  
13 would have made the fee higher.

14 A Um-hmm.

15 Q Does that sound right?

16 A That is right.

17 Q But you gave that testimony knowing that the commitment  
18 letter provides that at the end of the day, it is applicable  
19 law or the bankruptcy judge that is going to decide whether  
20 or not this fee letter gets disclosed; right?

21 A That's right.

22 Q Just one more thing going back to the discussions. You  
23 negotiated this with Miller Buckfire; right?

24 A Um-hmm.

25 Q During the course of --

1 A I'm sorry. I'm sorry.

2 THE COURT: Is your answer "yes"?

3 THE WITNESS: Yes. I'm sorry.

4 BY MR. SHERWOOD:

5 Q During the course of your discussions with Miller  
6 Buckfire, was there any back and forth with respect to  
7 particular terms concerning the Barclays commitment?

8 A Yes, there were.

9 Q Okay. So it wasn't as though you made a commitment and  
10 that was the end of the discussion?

11 A That's correct.

12 Q And while you were having that back and forth with Miller  
13 Buckfire, was it your understanding that Miller Buckfire was  
14 talking to other potential lenders and having similar  
15 conversations?

16 A It was our assumption but not our understanding.

17 Q And just one last question, and then I'm going to have to  
18 consult with my colleagues over here to see if I'm really  
19 done, but in terms of the market flex and the possibility  
20 that if that kicks in the interest rate may rise, you don't  
21 know for certain whether or not that market flex will kick in  
22 if the fee letter is made public, do you?

23 A We don't know for certain.

24 Q Thank you.

25 MR. SHERWOOD: Can I have one second, your Honor?

1 THE COURT: Yes, yes. Take your time.

2 MR. SHERWOOD: Let me just consult with the team  
3 over here.

4 THE COURT: Take your time.

5 BY MR. SHERWOOD:

6 Q I'm going to ask a question, but before I do, I want --  
7 this is -- this relates to the market flex and its relation  
8 to the total amount of the fee being charged by Barclays  
9 under the DIP loan. And this is just a "yes" or "no"  
10 question, and, you know, I'm just giving counsel a heads-up.  
11 Has Barclays done an analysis which compares the percentage  
12 of the market flex as compared to the total commitment fee?  
13 "Yes" or "no"?

14 A No.

15 MR. SHERWOOD: I do have -- your Honor, before I sit  
16 down, I would like to move to strike the testimony of this  
17 witness as it relates to DIP financing as he's got no  
18 personal knowledge or experience in this area. He did  
19 testify that it was his understanding that nondisclosure was  
20 the rule in Chapter 11 DIP financings. I think that's wrong  
21 for a lot of reasons, but I also think that it's certainly  
22 not something that this witness is --

23 THE COURT: Well, does your motion to strike include  
24 the testimony he gave in response to your questions, of which  
25 there were several?

1 MR. SHERWOOD: Well, I don't know which questions  
2 you're talking about. I mean I asked -- I asked --

3 THE COURT: The questions you asked him about his  
4 knowledge of DIP financing, of which there were several.  
5 Does your motion include that or not?

6 MR. SHERWOOD: Can I consult before answering that?

7 THE COURT: Of course.

8 MR. SHERWOOD: Your Honor, I think the consensus is  
9 to withdraw the motion. I think we've impeached the witness  
10 on that issue, and --

11 THE COURT: All right.

12 MR. SHERWOOD: -- we'll argue that later.

13 THE COURT: All right.

14 MR. SHERWOOD: Thank you, sir.

15 THE COURT: Redirect.

16 MR. SLIFKIN: If I may stand here, I'll be very  
17 brief, your Honor.

18 THE COURT: Oh, no. Stand at the lectern for me,  
19 please.

20 MR. SLIFKIN: Certainly.

21 REDIRECT EXAMINATION

22 BY MR. SLIFKIN:

23 Q You were asked on cross-examination whether you knew for  
24 certain that disclosure of the fee letter would lead to the  
25 triggering of the market flex. Do you recall that?



1 A I do.

2 Q Okay. And you said you don't know for certain. Do you  
3 recall that?

4 A Correct, yes.

5 Q Okay. In your view, however, how likely is it that the  
6 market flex would be triggered under those circumstances?

7 A I think it's very likely just given the motivation of the  
8 people -- the investors in this loan, lenders. Their  
9 motivation is to make as much money as possible.

10 MR. SLIFKIN: Thank you very much. I have nothing  
11 further, your Honor.

12 THE COURT: I have a question for you, sir. Why is  
13 it that the commitment fee would have been higher, as you  
14 testified, if you had known in advance that the fee letter  
15 would have been made public?

16 THE WITNESS: The thinking behind that, your Honor,  
17 is that recognizing that the investors to whom we syndicate  
18 the loan, the other banks, et cetera, are likely to try to  
19 get a piece of that once they know what it is, then we would  
20 have had to price that in better in terms of putting that.  
21 The other thing is -- if you don't mind my continuing for one  
22 second, is that had it been -- had we known this would be  
23 disclosed, we probably would have had to split the fee, you  
24 know. He mentioned, you know, the underwriting fee, the  
25 admin fee, the syndication fee, et cetera, and to parse it

1 out more specifically because that would have at least put us  
2 in a better position.

3 THE COURT: Um-hmm. Does the fee letter provide  
4 for -- start over. Do any of your agreements with the debtor  
5 provide for a higher commitment fee in this case should the  
6 Court deny this motion?

7 THE WITNESS: No. None of them do.

8 THE COURT: Did you request of the city that your --  
9 that any fee letter that is eventually agreed to be made the  
10 subject of a confidentiality order before you made a bid or  
11 as a condition of the bid?

12 THE WITNESS: No, we did not.

13 THE COURT: Did you consider doing that?

14 THE WITNESS: No, I don't think we did.

15 THE COURT: Are you feeling now like maybe that  
16 would have been a good idea?

17 THE WITNESS: In all honesty, I mean --

18 THE COURT: Of course, in all honesty.

19 THE WITNESS: In all --

20 THE COURT: You took an oath.

21 THE WITNESS: I'm sorry, but it's very important to  
22 us to -- this may sound -- it's very important to us to be  
23 there to help the city. I don't think that even if this had  
24 been made public -- I'm sorry if that sounds --

25 THE COURT: Well, hold on.

1 THE WITNESS: Okay.

2 THE COURT: What's very important to you is to make  
3 money.

4 THE WITNESS: Yes, but I don't think that we  
5 necessarily would have chosen to put in a provision that said  
6 if the Court ruled one way that we would walk away from our  
7 commitment.

8 THE COURT: Is it fair to say that the thrust of  
9 your commercial interest -- Barclays' commercial interest in  
10 maintaining the confidentiality of the fee letter is that if  
11 competitors see it, they will use that to their advantage in,  
12 what, future deals?

13 THE WITNESS: That's right.

14 THE COURT: And by that you mean undercut your fee  
15 structure?

16 THE WITNESS: Yes.

17 THE COURT: Of course, that would be good for your  
18 customers, wouldn't it?

19 THE WITNESS: They could end up with a lower cost,  
20 yes.

21 THE COURT: So heaven forbid there should be any  
22 future Detroits, but if there are, making this letter public  
23 would help them, wouldn't it?

24 THE WITNESS: Not necessarily, your Honor.

25 THE COURT: Okay. Why not?

1           THE WITNESS: Because right now the standard, as I  
2 had been -- as I believed in DIP's, is that there's not  
3 public disclosure of fees. There may be disclosure to  
4 committees, et cetera. The concern is that if -- going  
5 forward on a municipal DIP that if all fees are going to be  
6 made public, that may put a real chill in the market and  
7 disincent lenders from being willing to show their pricing  
8 model.

9           THE COURT: Um-hmm. So much for being willing to  
10 help the city, huh? All right. Any more questions for the  
11 witness? Sir, you may step down. Thank you.

12           (Witness excused at 12:24 p.m.)

13           MR. HAMILTON: Good afternoon, your Honor. Robert  
14 Hamilton of Jones Day on behalf of the City of Detroit. We  
15 have one witness to call, Mr. Doak, from Miller Buckfire. I  
16 expect his testimony to be very brief. I would suggest we go  
17 ahead and get it taken care of now.

18           THE COURT: Yes, please.

19           MR. HAMILTON: Call Mr. James Doak.

20           JAMES DOAK, DEBTOR'S WITNESS, SWORN

21           THE COURT: All right. Please sit down.

22                           DIRECT EXAMINATION

23 BY MR. HAMILTON:

24 Q    Could you state your name for the record, sir?

25 A    James Leland Doak.

1 Q Mr. Doak, where are you employed?

2 A I am employed at Miller Buckfire & Co., a Stifel Company.

3 Q How long have you --

4 THE COURT: Would you spell -- I'm sorry. Would you  
5 spell your last name for us?

6 THE WITNESS: Sure. D-o-a-k.

7 THE COURT: Go ahead, sir.

8 BY MR. HAMILTON:

9 Q And how long have you been at Miller Buckfire?

10 A I've been with Miller Buckfire and its predecessor firms  
11 for about 13 years.

12 Q And what is your current position at Miller Buckfire?

13 A I'm a managing director at Miller Buckfire.

14 Q And during the course of your career at Miller Buckfire,  
15 what has been the nature of your work?

16 A I represent companies and other issuers of debt as well  
17 as their stakeholders around distressed financial situations  
18 assisting them with a variety of investment banker-related  
19 tasks, asset sales, refinancings, financings, restructurings,  
20 and then also advising stakeholders and potential buyers and  
21 lenders in those situations as well.

22 Q And in the course of doing those services, have you had  
23 the occasion to run a process to solicit financing and other  
24 capital in restructurings?

25 A Yes, I have. Most situations that we become involved in

1 at some point have a solicitation process for capital.  
2 Sometimes that takes the form more of a sale process, and  
3 sometimes that takes a solicitation of an equity or debt  
4 financing process.

5 Q And before you joined Miller Buckfire, where did you  
6 work?

7 A Before Miller Buckfire, I -- and its predecessors, I was  
8 an investment banking analyst at Goldman Sachs.

9 Q And just briefly, did you -- where did you get your  
10 educational degrees from and when?

11 A Sure. I have a JD from Harvard Law School in 2000. I  
12 also have a masters in business administration from Harvard  
13 also granted in 2000, and my undergraduate is -- was from  
14 Harvard College, an AB, and that was in 1994.

15 Q Were you involved in the process of obtaining proposals  
16 for post-petition financing for the City of Detroit here?

17 A Yes, I was.

18 Q What was your role in that process?

19 A I was intimately involved in all aspects of the process  
20 for my client, the City of Detroit. Going from the starting  
21 point of figuring out what the solicitation process would  
22 look like, determining who the contacted parties would be,  
23 contacting those parties, explaining to them the solicitation  
24 process, receiving indications of interest, proceeding with  
25 due diligence questions that the various parties and their

1 advisors had, receipt of proposals, a determination of which  
2 parties would proceed forward in the process, creation of  
3 subsequent requests for definitive proposals, receipt of  
4 those proposals, and evaluation of how then we should spend  
5 our time in getting to the final proposal, which was the  
6 Barclays proposal.

7 Q And were you involved in the negotiations with Barclay of  
8 the financing proposal that is the subject of our underlying  
9 motion here?

10 A Yes, I was.

11 Q Would it be fair to characterize your role as the lead  
12 negotiator for the City of Detroit in connection with the  
13 negotiations with Barclays?

14 A I would say I was one of the negotiators. I'm on the  
15 finance and business structure side. The city had other  
16 parties involved.

17 Q Okay. Are you familiar with the concept that's been  
18 discussed today of market flex in these type of financing  
19 facilities?

20 A Yes, I am.

21 Q Why is the concept -- or why is the provision of market  
22 flex provisions in such financing facilities important, in  
23 your judgment?

24 A Um-hmm. Well, market flex is a critical component of a  
25 proposal that comes in a fully underwritten deal that allows

1 a would-be financing party to put the best possible terms in  
2 front of the issuer or borrower and at the same time allow  
3 the parties to allocate the risk associated with the  
4 syndication process. If we didn't have market flex, then  
5 would-be underwriters would be forced to assume or would be  
6 pressured to assume a -- you know, worser possible scenarios  
7 in coming up with financing, and also to the extent that they  
8 assume better proposals, the parties would not know exactly  
9 how best to manipulate the process or negotiate with other  
10 parties in the syndication process, so it's an important give  
11 and take that gives the issuer the opportunity to achieve the  
12 best possible financing while at the same time having the  
13 confidence that the proceeds can be raised.

14 Q In your experience, are market flex provisions usually  
15 kept confidential?

16 A Yes. In -- yes.

17 Q Why is that?

18 A Market flex provisions and their nature, how exactly they  
19 will come into effect, which particular terms they relate to,  
20 noneconomic and economic, are kept confidential because it  
21 allows the underwriter and the arranger as much flexibility  
22 as possible to derive the lowest possible cost of financing  
23 for the issuer while at the same time achieving their  
24 syndication goals. If we just posted on the billboard, you  
25 know, what the terms were, then you start the dialogue with



1 would-be investors at the high part of the range rather than  
2 what the announced financing would be.

3 Q All right. So are you familiar with the market flex  
4 provisions that are contained in the fee letter in this case  
5 with Barclays?

6 A Yes, I am.

7 Q Were you involved in negotiating those provisions?

8 A Yes.

9 Q If those provisions, the market flex provisions, in the  
10 fee letter were disclosed to the general public in this case,  
11 would that have the potential for adverse economic  
12 consequences for the City of Detroit?

13 A Yes, it would.

14 Q Could you explain why?

15 A It would have the potential for negative economic  
16 consequences because the provisions relate to, amongst other  
17 terms, the factors of the interest rate that the city will  
18 have to pay as it goes forward in this financing process, and  
19 if those terms are publicly announced, then Barclays will  
20 have to go to market and be discussing with would-be  
21 investors, you know, how much off the max they'll, you know,  
22 have to be in order to achieve their syndication goals rather  
23 than what would be best for the city, which is starting with  
24 the announced price and determining what they need to do to  
25 achieve their syndication goals.

1 Q During the negotiations with Barclays, did Barclays take  
2 a position as to whether or not the contents of the fee  
3 letter should remain confidential?

4 A Yes.

5 Q What was their position?

6 A Their position was that the provisions of the fee letter  
7 in its entirety should remain confidential.

8 Q During those negotiations, did the parties discuss what  
9 would happen if the Bankruptcy Court were to require the  
10 submission of the fee letter as part of its adjudication of  
11 the financing motion?

12 MR. SHERWOOD: Objection. It's irrelevant. It's  
13 dealt with in the commitment letter. There are no  
14 consequences.

15 MR. HAMILTON: Well, that's where I was going, your  
16 Honor.

17 THE COURT: All right. You may go there.

18 THE WITNESS: Well, we -- the commitment letter says  
19 what it says, and --

20 BY MR. HAMILTON:

21 Q What does it say that the City of Detroit is required to  
22 do if the Bankruptcy Court wants to see the fee letter?

23 A Well, we -- pursuant to the exclusions to the  
24 confidentiality provisions, we would present the fee letter  
25 to the Bankruptcy Court. These provisions, in my experience,

1 are sometimes, you know, provided to a smaller set of people  
2 than the entire world.

3 Q Does the -- those provisions in the commitment letter  
4 that require the fee letter to be submitted to the Court  
5 confidentially, do they require the City of Detroit to file a  
6 motion to have the fee letter submitted under seal?

7 A Yes, they do.

8 Q All right. And has the city complied with that  
9 obligation in the commitment letter?

10 A Yes, the city has.

11 MR. HAMILTON: I have no further questions, your  
12 Honor.

13 THE COURT: Thank you, sir. Are you going to be  
14 proceeding with the cross-examination, and would you like a  
15 few minutes?

16 MR. SHERWOOD: It's up to the Court, your Honor. If  
17 you want to get this done, I'm prepared to go forward. If  
18 you want to take a break, then --

19 THE COURT: All right. Let me ask you to do that  
20 then.

21 MR. SHERWOOD: Could I have a few minutes?

22 CROSS-EXAMINATION

23 BY MR. SHERWOOD:

24 Q Mr. Doak, is that --

25 A Yes.

1 Q The city and Barclays will be asking the Bankruptcy Court  
2 to enter an order approving this financing; is that right?

3 A Yes.

4 Q And as part of that order, it will ask the Court to make  
5 a finding that the city and Barclays were dealing in good  
6 faith and at arm's length; correct?

7 A I haven't read the order.

8 Q Okay. In your experience, is it kind of important to a  
9 DIP lender that it be considered a good faith lender?

10 A Yes.

11 Q Okay. You were here for the prior examination, and I  
12 quoted from your declaration where you said that you were of  
13 the belief that even if the market flex provisions are fully  
14 exercised, the pricing of this post-petition financing would  
15 still be below what is typical for a post-petition bankruptcy  
16 financing. Do you remember writing that in your declaration?

17 A Yes.

18 Q And is that still your testimony?

19 A Yes.

20 Q In your work at Miller Buckfire, I assume you do work --  
21 you've done a lot of DIP financings. Do you guys normally  
22 work for the borrower, the debtor?

23 A Most often we work for the borrower.

24 Q Okay. And when you're analyzing potential DIP loans in a  
25 Chapter 11 context, don't you have access to public

1 information that sets forth terms and conditions of DIP loans  
2 in other big cases?

3 A Yes.

4 Q And in the performance of your duty as an investment  
5 banker for the city, you routinely refer to these databases  
6 to see what the marketplace is doing; correct?

7 A Yes.

8 Q And you'd agree, would you not, that in a typical Chapter  
9 11 case, it's pretty common for the debtor to have to  
10 disclose what the fees are that it's going to pay in  
11 connection with its proposed DIP loan, would you not?

12 A The economics of the loan are there's elements that are  
13 frequently disclosed and there's elements that are held back,  
14 held under seal, provided only to professionals. It depends  
15 on the situation.

16 Q But you'd agree that the situations where information is  
17 held back, that's the exception. That's not the norm.

18 A It would depend on which particular economics you're  
19 talking about as in the typical -- because in the typical  
20 Chapter 11 setting, the debtor needs court approval to pay  
21 the commitment fee, that commitment fee is normally  
22 disclosed.

23 Q And would you agree that the standard practice in the  
24 Southern District of New York, for example, is to disclose  
25 all types of fees that are being paid by the debtor in

1 connection with the loan?

2 A I don't have sufficient -- I have not sufficiently  
3 reviewed Southern District, you know, recent cases to make  
4 that statement.

5 Q But generally you would counsel one of your borrowers to  
6 comply with the rules of that court when it was filing an  
7 application for financing in that court; right?

8 A I'm the finance guy, not the legal guy.

9 Q Okay. During the course of your negotiations with  
10 Barclays and the 15 other potential lenders, is it fair to  
11 say that each of the other 15 potential lenders disclosed to  
12 you the full terms and conditions, including fees and market  
13 flex, with respect to their loans?

14 A No.

15 Q Okay. How did you know what the other 15 were proposing?

16 A The 16 total proposals that we received on our original  
17 deadline arrived in a variety of formats, and some were  
18 commitments for a portion of the facility. Some were  
19 commitments for the entire facility. So some had enough  
20 definition so that we could answer that question, and some  
21 did not.

22 Q Okay. But at least some of them disclosed what the fees  
23 were that they were going to charge together with the  
24 interest rate?

25 A Yes.

1 Q So you -- so I think you talked about pricing, and I  
2 think we talked about pricing. Pricing includes a  
3 combination of the fee and the interest rate; correct?

4 A In various components, and then there's other terms of  
5 the financing you have to take into account, yes.

6 Q And from your perspective, as the investment banker for  
7 the city, it was important for you to know which of -- what  
8 the pricing terms were with respect to this loan; correct?

9 A Yes.

10 Q And in your experience in Chapter 11 when you're  
11 representing a borrower, isn't it commonplace for a  
12 creditors' committee to investigate pricing of a DIP loan?

13 A Yes.

14 Q And as debtor's professional in the Chapter 11 context,  
15 you give that information to the committee's counsel and its  
16 financial advisors; right?

17 A In many contexts, yes.

18 Q In the other proposals that you considered other than  
19 Barclays, did those proposals include commitment fees as well  
20 as reimbursement of professional fees and expenses?

21 A Yes.

22 Q And did any of the other proposals provide any type of  
23 estimates or caps with respect to the professional fees and  
24 expenses that would be charged against the loan over and  
25 above the commitment fee?

1 A I don't recall any caps.

2 Q In terms of the market flex, would it be possible for  
3 Barclays to give up some of its commitment fee to people in  
4 the syndicate or as part of the syndication -- would it be  
5 possible for Barclays to give up some of its commitment fee  
6 as opposed to getting someone in the syndicate to raise the  
7 interest rate?

8 A Could you try that again? Could you --

9 Q So if Barclays goes out to a potential financial party  
10 that it wants to join the syndication and that potential  
11 financial party says, "I'm not willing to do it at this  
12 interest rate. I want more money from the city," can  
13 Barclays, in turn, say, "In lieu of that, I'll give you  
14 some -- an up front fee"? Is that hypothetically possible?

15 A That is possible, yes.

16 Q Does that happen?

17 A Yes. In my experience, a syndication process typically  
18 has a number of different terms in play, and that's one of  
19 the reasons why, you know, firms like Barclays and others are  
20 great at what they do. They are able to manage those  
21 competing interests of various parties to achieve the best  
22 overall results for their clients.

23 Q And you would agree generally that in addition to the  
24 objective of trying to save the city from this market flex  
25 possibility on the interest, one of the objectives here in



1 keeping this fee letter confidential is so that Barclays can  
2 make more money; isn't that right?

3 A Well, it's not my objective. It's not the city's  
4 objective.

5 Q No. I understand that.

6 A The city's objective is to --

7 Q But from --

8 A -- achieve the lowest overall cost of financing.

9 Q No, but from Barclays' perspective, it's so it can make  
10 money in its negotiations with potential parties to the  
11 syndication.

12 MR. HAMILTON: Object. Argumentative. Wrong  
13 witness.

14 THE COURT: If the witness knows, he can testify.  
15 Can you answer that question?

16 THE WITNESS: I mean Barclays is providing this. I  
17 can't speak to what's going to happen at Barclays if they are  
18 in a position where they are not achieving their syndication  
19 thresholds and they are going to have to make a determination  
20 as to how they are going to deploy the various provisions of  
21 the flex as well as their commitment fee as well as thinking  
22 about their cost of capital in determining where they want to  
23 get to on selling down the commitment.

24 BY MR. SHERWOOD:

25 Q Are you saying that Barclays can raise its commitment

1 fee?

2 A No.

3 Q So their commitment fee is fixed today; right?

4 A Yes, it is.

5 Q And the only thing that isn't fixed arguably is the  
6 interest rate?

7 A On pricing there's an -- elements of the interest rate,  
8 that provision, that remain open.

9 MR. SHERWOOD: Let me have a moment, your Honor. I  
10 think I'm --

11 THE COURT: Yes, sir.

12 THE WITNESS: Thank you.

13 MR. SHERWOOD: Thank you, your Honor.

14 THE COURT: Any redirect?

15 MR. SHERWOOD: I have no further questions.

16 MR. HAMILTON: No redirect, your Honor.

17 THE COURT: Sir, you may step down. Thank you for  
18 your testimony.

19 (Witness excused at 12:47 p.m.)

20 THE COURT: No further witnesses for the city or  
21 Barclays?

22 MR. HAMILTON: No, your Honor. We rest on the  
23 evidentiary presentation.

24 THE COURT: Any witnesses for any of the objecting  
25 parties? Closing arguments, please.

1 MR. HAMILTON: Your Honor, the City of Detroit would  
2 waive a closing and reserve time for rebuttal.

3 THE COURT: Okay. And for this I'll let any of the  
4 objecting parties argue.

5 CLOSING ARGUMENT

6 MR. JAMES: Good afternoon, your Honor. Again, for  
7 the record my name is Mark James. I'm here on behalf of --  
8 well, FGIC we call it, your Honor. That's Financial Guaranty  
9 Insurance Company.

10 Your Honor, I know the Court has had a chance to  
11 review our paper, and as you've derived from our paper, all  
12 we're asking for is for the confidential disclosure of the  
13 fee letter and the engagement letter to FGIC and to its  
14 professionals, including counsel and its financial advisors,  
15 so they can analyze the pricing contained in those documents  
16 in respect to the overall proposed DIP facility. FGIC is not  
17 going to and agrees to not disclose this to its insureds, to  
18 any of the parties, to the general public. It's not going to  
19 post this on its website. It's going to keep this  
20 confidential.

21 THE COURT: Well, but what are you going to do if  
22 you find grounds to object to the terms in the fee letter?

23 MR. JAMES: Your Honor, then we would seek to file  
24 our objections under seal so that those objections are not  
25 known to the general public. We will do what we can to

1 protect this information that's disclosed in the letters.  
2 We'll do the same thing the city is doing right now, your  
3 Honor. We will do what we can and what the Court allows to  
4 prevent the general dissemination of this information.

5 Your Honor, we have asked for this obviously before  
6 the motion was heard. We did receive a document very late  
7 last night seeking to deal with this issue, a proposed  
8 confidentiality agreement, that, frankly, was so one-sided  
9 that it made serious consideration impossible. We received  
10 this at about 11:34 last evening, your Honor.

11 I believe the Court has the ability to fashion the  
12 relief that FGIC is asking for pursuant to Section 105(a) of  
13 the Code, your Honor.

14 THE COURT: What do I do --

15 MR. JAMES: I don't --

16 THE COURT: What do I do about what appears to be  
17 plain language in Section 107(b), "the bankruptcy court shall  
18 protect any entity with respect to a trade secret or  
19 confidential research, development, or commercial  
20 information"?

21 MR. JAMES: Your Honor, I think that the -- just  
22 limited to FGIC, your Honor, I think the relief that we're  
23 seeking is not incompatible with 107(b). That says that the  
24 Court has an obligation to protect. We're not asking for  
25 wholesale general dissemination of this information. We're

1 asking, as Mr. Doak had stated, for very limited disclosure  
2 to professionals, to FGIC, to its financial advisors, and to  
3 its counsel, for the sole purpose of analyzing --

4 THE COURT: How many such people are there?

5 MR. JAMES: Individuals or firms?

6 THE COURT: How many such people are there?

7 MR. JAMES: I don't know an answer to that question.

8 THE COURT: Well, are we talking about four people  
9 or twenty-four people or a hundred and twenty-four people?

10 MR. JAMES: I think it's probably less than 124  
11 people, your Honor.

12 THE COURT: How many people? Well, you get the  
13 point.

14 MR. JAMES: Yes.

15 THE COURT: The point is the more people, the more  
16 likelihood there is of breach.

17 MR. JAMES: I understand that, your Honor. I do.  
18 And I -- you know, I can't --

19 THE COURT: Where's the protection if there's  
20 breach?

21 MR. JAMES: Well, if the Court orders FGIC and its  
22 financial advisors and its counsel not to disclose this  
23 information, they'd be subject to contempt.

24 THE COURT: Then someone is going to have to prove a  
25 contempt case?

1 MR. JAMES: Yes.

2 THE COURT: And, besides, the damage is done at that  
3 point.

4 MR. JAMES: I suppose that's correct, your Honor,  
5 but we are dealing with professionals. We're dealing with  
6 people who deal with confidential information as a matter of  
7 course. Counsel -- both my firm, Williams, Williams, Rattner  
8 & Plunkett, and the New York firm that's representing FGIC --  
9 that's Weil Gotshal -- that's what we do. We maintain the  
10 confidences of our clients. We are -- we have ethical -- as  
11 you know, we have ethical obligations not to disclose  
12 information. This would be no different than protecting a  
13 client's confidences, your Honor.

14 THE COURT: Okay.

15 MR. JAMES: Thank you, your Honor.

16 CLOSING ARGUMENT

17 MR. GOLDBERG: Good morning, your Honor. Jerome  
18 Goldberg. I'm here on behalf of interested party David Sole.  
19 I'll be brief, your Honor.

20 I was struck by the testimony that said that Barclay  
21 is charging a fee to cover -- because of its risk-taking. In  
22 my -- and I understand that we're not here to analyze this  
23 deal today, but when I looked at the deal, it was pretty  
24 clear to me that ultimately the cost of this deal is going to  
25 be borne by the taxpayers of the city and by the residents of

1 the city, which include my client and actually include  
2 myself. When I calculated it that approximately for six  
3 years after bankruptcy 20 percent of income tax revenues for  
4 the City of Detroit are going to be used to pay Bank of  
5 America, to pay off Bank -- to pay off this loan to pay off  
6 Bank of America and UBS, two banks, 20 percent of tax  
7 revenues, and there's also a lien, of course, on the casino  
8 tax revenues. To me when I looked at the deal, it's the  
9 people of the city that are going to be paying on this deal  
10 for years to come, not just during the bankruptcy but even  
11 more afterwards at a higher interest rate than was disclosed  
12 today. The idea that the people of the city are not entitled  
13 to know the full terms of this deal when they're going to be  
14 paying for this deal for years to come just struck me as  
15 unconscionable. It also struck me a violation of the Freedom  
16 of Information Act, which applies to Michigan. I looked at  
17 the FOIA, and interestingly enough, the testimony was that  
18 the confidentiality was subject to applicable law. I looked  
19 at the exemptions under FOIA, and there is no exemption for  
20 fees associated with a deal like this. The closest exemption  
21 I found was 15.243(i), which covers, "A bid or proposal by a  
22 person to enter into a contract or agreement, until the time  
23 for the public opening of bids or proposals, or if a public  
24 opening is not to be conducted, until the deadline for  
25 submission of bids or proposals has expired." Well, as they

1 testified, the deadline for submitting the bids has expired.  
2 Under Michigan law -- under Michigan law, which favors --  
3 which covers the FOIA, which says the people shall be  
4 informed so they may participate in the democratic process,  
5 there is a duty to disclose, and under the FOIA, if it's not  
6 specifically covered by an exemption, it has to be disclosed.  
7 So the point I would say is it's the people of the city that  
8 are going to be paying for this deal. And, again, I'm not  
9 here to debate the merits of the deal, but I have severe  
10 questions about it. It's the people that are committing our  
11 tax dollars for years to come to pay off a couple of banks  
12 basically with a small number -- about one-third going to  
13 services, and for the people to be asked to pay off a deal  
14 like this without even knowing the fees that a bank like  
15 Barclays is charging seems to me unconscionable and illegal  
16 under Michigan law, and I would ask you to -- and, moreover,  
17 it's not going to cut the deal whatsoever. And even the  
18 market flex, the fact is they're committed to an interest  
19 rate. They're trying to get the market flex to get a  
20 slightly better deal from what I heard. They're still  
21 committed to the deal. So I would ask you to reject this. I  
22 think that it really would be an insult to the people of the  
23 city to not get the full terms of this deal both because  
24 we're paying for it and we're entitled to know. Thank you.

25

CLOSING ARGUMENT



1 MR. SHERWOOD: Your Honor, I think when you talk  
2 about confidential commercial information, I think you got to  
3 deal with expectations. What is the expectation of someone  
4 coming into a bankruptcy case, and what is it, and what  
5 should it be. You know, any attorney who works for a  
6 committee, a financial advisor, counsel for the debtor, they  
7 have to disclose their rates, their hourly rates and so  
8 forth. They don't do -- they don't do that on their website.  
9 They don't -- that's not public information, but when you  
10 walk into a Bankruptcy Court and you make a loan, you have to  
11 disclose the information, and full disclosure of fees is the  
12 rule. It's not the exception. It is the rule. It is the  
13 rule, and I know I've cited -- in my questioning I talked  
14 about the Southern District of New York, and I know that that  
15 is not binding here, and your Honor can take it or leave it,  
16 but they cite to all these cases in the Southern District of  
17 New York, and in that district it is written into the local  
18 rule that these fees -- all fees, not just non-sensitive  
19 fees, all fees have to be disclosed, and that's why -- and  
20 just for someone to come in and say, well, this is different  
21 doesn't carry the burden, and I don't think they did it.

22 They cite to ResCap and Patriot Coal. It's a matter  
23 of public record. Both of those cases had a lot more  
24 disclosure than is projected here. They put the fee letters  
25 on the court docket. It's part of the order that they cite

1 to. And they did disclose in those Chapter 11 cases the  
2 aggregate amount of fees, and the city is not willing to do  
3 that here. And obviously in order for any financial party in  
4 interest in a DIP financing context to analyze the bona fides  
5 of that DIP financing, fees charged on the loan is a huge  
6 issue because, you know, the only -- one of the main things  
7 that the parties who are arguably or potentially below them  
8 in the waterfall in this case want to know is what are the  
9 terms and conditions of payment to the Barclays or whoever  
10 that's above me, and the fees and the interest rate is  
11 obviously something that anybody who is a creditor of the  
12 city deserves to know. And I think layer on top of that that  
13 this is a deal with a city and the general understanding that  
14 transactions with cities are a matter of public record, the  
15 expectation just wasn't there, so it isn't confidential  
16 commercial information because there's no way that Barclays  
17 could reasonably expect it to be, and the agreement bears  
18 that out because the commitment letter -- the confidentiality  
19 commitment in the commitment letter at paragraph 8 has  
20 qualifications, to the extent permitted by applicable law, as  
21 required by the Bankruptcy Court, and the only commitment on  
22 the part of the city, which they fulfilled, was to try, and  
23 they tried, but to the extent your Honor or applicable law  
24 requires disclosure, everything is fine. Barclays is still  
25 here. There is the threat of the interest rate going up, but

1 even if that happens, Barclays -- or Miller Buckfire has  
2 testified that it's still below the range of a DIP financing.  
3 Barclays' syndication is optional. It reserves the right to  
4 syndicate, so it's not necessarily going to happen.

5 I think the common practice is full disclosure.  
6 It's especially important in a case like this, and the city  
7 has not made the case for confidentiality. The city has  
8 taken a very extreme view here. On behalf of AFSCME, we  
9 think that they have not made the case, and there should be  
10 full disclosure like in the normal situation, but if the  
11 Court -- and the Court should definitely not grant the motion  
12 as submitted. There are ways to protect confidentiality, but  
13 certainly AFSCME and every financial party in interest in  
14 this case deserves to analyze what this fee letter says just  
15 like the city had a chance to do it and its professionals had  
16 a chance to do it. Miller Buckfire saw proposals from 16  
17 different proposed lenders that had all of this information.  
18 To say that the stakeholders and their representatives can't  
19 see the same information is wrong. Thank you.

20 CLOSING ARGUMENT

21 MR. NEAL: Good afternoon, your Honor. Guy Neal,  
22 Sidley Austin. We filed a joint objection. Just real brief,  
23 you have National Public Finance Guarantee Corp., you have  
24 Assured Guaranty Municipal Corp., and you have Ambac as well.  
25 Taken together, your Honor, that's almost about \$5 billion

1     worth of municipal bonds outstanding that those three  
2     entities insure ranging from water and sewer system bonds,  
3     unlimited tax general obligation bonds, limited tax bonds,  
4     parking bonds, and the like. I can go on, but the litany is  
5     not relevant for this purpose.

6             Your Honor, we have a strong overarching vital  
7     economic interest in the future of the city. Our clients  
8     will be insuring these bonds hopefully for a very long period  
9     of time, and, as such, as creditors and the public generally,  
10    as you heard from Mr. Goldberg, are entitled to a transparent  
11    and open process in evaluating the proposed post-petition  
12    facility. That transparency, of course, would be materially  
13    disturbed should the seal motion be granted.

14            An open and transparent process necessitates full  
15    disclosure concerning the terms of the facility. I'm going  
16    to focus less -- and I'll be very brief, your Honor. I'll  
17    wrap up in a couple minutes. I'm going to focus less on the  
18    market flex and more on the fees because I think, your Honor,  
19    that's where your questions to the Barclays witness were  
20    directed to. Where is the disadvantage in this process in  
21    the full and open disclosure of those fees? Perhaps not a  
22    breakdown, but the aggregate amount of those fees, and you  
23    heard Mr. Sherwood recite the precedent in the Southern  
24    District and in other cases in which the total amount of  
25    those fees are disclosed. In fact, those fee letters are, in

1 fact, on the docket.

2 The main interest that was advanced by Barclays is  
3 this could be a competitive disadvantage in future post-  
4 petition borrowings in the municipal bond Chapter 9 arena.  
5 Well, of course, as everyone concedes, this has never been  
6 done before, and I don't think precedent should be set that  
7 going forward in a municipal context, number one, a Chapter 9  
8 context, number two, that there should be a precedent that  
9 the total cost of this facility, the total cost of this  
10 facility should be kept under wraps.

11 Next I'm going to just turn and close with the issue  
12 that FGIC's counsel raised, and that is the proposed  
13 confidentiality agreement, which was floated last night  
14 around 11:30 for advisors' eyes only. That doesn't work,  
15 your Honor. It also contains an indemnity provision such  
16 that if my law firm signed it, we'd have to indemnify  
17 Barclays. And, in fact, your Honor, the only other time I  
18 was front of you, your Honor, that was the end of August in  
19 the context of the city's requirement that we had to sign an  
20 indemnity to get access to the Milliman materials, and your  
21 Honor quickly made it plain that that should be opened up,  
22 the data room and all Milliman materials. In the absence of  
23 a strict confidentiality agreement which rather handcuffs  
24 your ability to not only evaluate the information because you  
25 can't turn to your financial advisors under their proposed

1 confidentiality, but it also handcuffs your ability to use  
2 that information, and we join with FGIC's counsel that to the  
3 extent such information may ultimately be used, if you don't  
4 open it all up, your Honor -- to the extent it will  
5 ultimately be used if it's not opened up, certainly that can  
6 be filed under seal.

7           So, your Honor, in closing, I think you said it  
8 best. When you talk about -- or when Barclays talks about  
9 needing to keep this information or to provide for  
10 flexibility, you said "a little bit" is so vague as to be  
11 meaningless, your Honor, so vague as to be -- or to render  
12 incapable of any effective analysis, and we do think a  
13 transparent process should be strongly encouraged and should  
14 be, frankly, the precedent going forward, so thank you for  
15 your time.

16                                   CLOSING ARGUMENT

17           MR. KOHN: Good afternoon, your Honor. Samuel Kohn  
18 of Chadbourne & Parke on behalf of Assured Guaranty Municipal  
19 Corp. We're one of the bond insurers that joined in the  
20 objection with National.

21           First of all, your Honor, I would like to address  
22 your Honor's question about 107(b), and it's a very good  
23 question because the words "confidential commercial" --  
24 "confidential research, commercial information" is -- it  
25 could be considered confidential research, development, or

1 commercial information. Now, the question is how  
2 confidential is it really. Barclays is a bank. They take  
3 risks. They knew that there is a risk, and they priced that  
4 risk in this becoming public because if it was really  
5 confidential, they would have not -- they would have had  
6 conditions that they were not going to go forward; that it  
7 shouldn't be disclosed in any event -- in all events, but the  
8 fact that they allowed some outs and understood that --  
9 they're a bank. They're in the business of risk. They  
10 priced their risk, and that means that pricing of that risk  
11 is not confidential within the meaning of 107(b).  
12 Confidential -- 107(b), the confidential commercial  
13 information, means confidential, that they're really going to  
14 get harmed. This is a question of more profit for Barclays  
15 or less profit for Barclays versus transparency and fairness  
16 for everybody to evaluate whether the city is exercising  
17 their reasonable business judgment in choosing this financing  
18 and the DIP financing. That's why it's critical.

19 Now, if it doesn't get -- if it doesn't get  
20 disclosed, people -- the notice and opportunity for people to  
21 object to the financing will be handicapped because we're not  
22 going to know. We're not going to know if it's reasonable or  
23 fair under the standards of Section 364, and, your Honor, I  
24 would -- you know, I would say that this is a Chapter 9 case,  
25 of course, but 364 is included in 901. Everything related to

1 64, all rules, all standards of Chapter 11 should be applied  
2 in Chapter 9 because of the words that 364 is in 901, and in  
3 Chapter 11 even the testimony that -- it was brought out in  
4 cross-examination, of course, that in Chapter 11 this doesn't  
5 happen.

6 And, your Honor, I just want to say one last thing  
7 is that this is the first -- this is the first Chapter 9  
8 post-petition financing. You will be setting precedent here,  
9 and people will look to your case, to Detroit, whether this  
10 is -- whether 364 is included in 901 except for confidential  
11 fee letters or whether the standards of Chapter 11 apply.  
12 Thank you, your Honor.

13 CLOSING ARGUMENT

14 MR. GORDON: Good afternoon, your Honor. Robert  
15 Gordon on behalf of the Detroit Retirement Systems. I'm  
16 pleased to report to the Court that I will, due to the time,  
17 just concur and join in the other closings. I have nothing  
18 further to add. Thank you, your Honor.

19 THE COURT: Thank you. Anyone else on the objecting  
20 side? Rebuttal, sir.

21 MR. HAMILTON: Thank you, your Honor.

22 REBUTTAL ARGUMENT

23 MR. HAMILTON: Three overall points, your Honor.  
24 First is a procedural matter. We're here on a motion to file  
25 the fee letter under seal with the Court. I do not believe



1 we are here today on a motion for a protective order filed by  
2 either the City of Detroit or Barclays as to what  
3 conditions -- under what conditions we would turn over the  
4 fee letter to objectors in discovery. In other words, we're  
5 not here today to present to you a dispute because we  
6 couldn't work out a confi where everybody would be in  
7 agreement. Hopefully, we will be able to work out a confi.

8 THE COURT: Okay. So what happens if the motion is  
9 denied?

10 MR. HAMILTON: Then a confi kind of becomes  
11 irrelevant because if the motion is denied, it would be  
12 publicly available. If the motion were approved, then we  
13 have to work out the terms under which the portions of the --  
14 whatever portions of the fee letter we're going to disclose  
15 in discovery are going to be disclosed under terms of  
16 confidentiality agreements. If we can't work it out amongst  
17 us, we may have to come back to your Honor to resolve those  
18 disputes as to what the confi should say and what it  
19 shouldn't, whether it should have an indemnity provision or  
20 whether it shouldn't, but that's not here today. The issue  
21 today is whether the fee letter should be disclosed to the  
22 entire public in general, not to the objectors in discovery  
23 under the terms of a confi.

24 Second, many of the questions on cross and all of  
25 the arguments tended to merge or conflate what are two

1 distinct issues we think, at least from the City of Detroit's  
2 perspective. The fee letter has two components. It has the  
3 market flex provisions, and it also references the commitment  
4 fee that the City of Detroit has already agreed to pay to  
5 Barclays. The analysis, I think, of those two provisions are  
6 different in terms of the confidentiality arguments and the  
7 public disclosure arguments that have been made.

8           With respect to market flex, the evidence in the  
9 record is un rebutted. It would cause -- has the potential to  
10 cause substantial economic detrimental consequences to the  
11 City of Detroit if the market flex provisions are made  
12 publicly available to the general public because potential  
13 participants in the syndication of this financing facility  
14 will then demand close to or not the cap that's set forth in  
15 the market flex provisions resulting in the City of Detroit  
16 and, therefore, all its residents paying a much higher  
17 interest rate than they would otherwise. That is the  
18 economic detriment that we are trying to avoid, and that  
19 evidence is un rebutted.

20           THE COURT: But how do you deal with the argument  
21 that says democracy is inefficient?

22           MR. HAMILTON: Your Honor, I have an argument for  
23 that. Here's how I deal with it, and I want to comment on  
24 counsel's -- one of the -- the second counsel's comments  
25 about FOIA. There are no -- we have not done an exhaustive

1 analysis nor have we briefed it for the Court, but I think we  
2 could all agree there are no provisions in Michigan's FOIA  
3 that directly address this particular situation, and so if a  
4 FOIA request were to be made, there might be litigation as to  
5 what extent the Barclays proposal and the market flex  
6 provision falls within an exception under Michigan's FOIA.

7 THE COURT: Well, without losing sight of my  
8 question to you, isn't FOIA set up such that everything is  
9 disclosed except for specially -- specifically identified  
10 types of information?

11 MR. HAMILTON: That's correct, your Honor. And what  
12 I was going to make a reference to was counsel's suggestion  
13 that there is an exception in FOIA for bids in an auction  
14 process, and they said up until the time the bidding is  
15 closed, the information is not discoverable under FOIA;  
16 right? And then once the bidding is closed, there's no  
17 economic detriment to the city or to the government to  
18 disclosing the information, and it's disclosed. By analogy  
19 here, once the syndication is closed, there is no economic  
20 detriment to the City of Detroit if the market flex  
21 provisions are revealed to the public, but until the  
22 participation, the syndication of this facility is closed,  
23 there is detriment to the City of Detroit, and by analogy --

24 THE COURT: So you're arguing that the bidding that  
25 FOIA refers to is the syndication bidding, not the bidding to

1 the city regarding the underlying financing?

2 MR. HAMILTON: Your Honor, I wasn't making a literal  
3 argument. It was by analogy. The point is -- you made the  
4 point about democracy.

5 THE COURT: Well, but FOIA doesn't work by analogy.  
6 Either the information is exempted or it isn't.

7 MR. HAMILTON: That's correct, your Honor. I think  
8 a legal argument could be made in the proper forum under FOIA  
9 that the market flex provisions do not need to be disclosed  
10 under FOIA until the syndication process is completed, and  
11 certainly our argument would be, in response to your  
12 question, as a matter of democracy it is in the interest of  
13 the residents, of the citizens of the state -- of Detroit not  
14 to disclose the market information to them until after the  
15 syndication process is over because they'll get a lower  
16 interest rate as a result. It's in their interest. That is  
17 the same principle why you don't disclose bids to the public  
18 until after the bidding is closed. That's how you reconcile  
19 the democratic viewpoint that you have to disclose everything  
20 to your citizens with the practical reality of it's not  
21 really in their interest to know this information until after  
22 the bidding is closed.

23 THE COURT: Well, but how do they participate in the  
24 process unless they have all the information?

25 MR. HAMILTON: That's where confis come in. That's

1 where in a Chapter 11 --

2 THE COURT: Where what comes in?

3 MR. HAMILTON: That's where confidentiality  
4 agreements come in. That's where the litigants --

5 THE COURT: Oh, confi. Got it.

6 MR. HAMILTON: -- the professional advisors can see  
7 it. You can get expert testimony as to whether or not the  
8 market flex provisions are above market or below market or  
9 are improper somehow without disclosing on the public record  
10 what the cap is, and that will maximize everybody's interest.  
11 It will protect the city's residents because they'll get the  
12 best interest rate possible, and you'll still get the expert  
13 testimony you need. If, in fact, any of the objectors decide  
14 to argue that the market flex provisions are improper  
15 somehow, you can still get that expert testimony through  
16 declarations under seal, through general references without  
17 disclosing the actual cap figure on the record in court.

18 THE COURT: So this foresees objections under seal,  
19 a closed courtroom?

20 MR. HAMILTON: Unlikely. It's possible, your Honor,  
21 unlikely. I think it is unlikely that --

22 THE COURT: Well, it's only unlikely because you  
23 don't think they'll have any grounds to object to the flex  
24 position.

25 MR. HAMILTON: On the market flex provision, the

1 only testimony in the record is that it's below market even  
2 with the market flex provisions. If they want to challenge  
3 that, they can, and you can do that with expert testimony  
4 without disclosing the actual figure in open court. It can  
5 be done, and it's in everybody's interest to do it that way,  
6 particularly the residents of Detroit, because that'll get  
7 them a lower interest rate. That's the unrebutted testimony  
8 from today's hearing.

9           The second aspect of the fee letter is the  
10 commitment fee as opposed to the market flex, and this is  
11 largely Barclays' concern, their confidential commercial  
12 information of what the commitment fee is they charge and  
13 what we agreed to pay. I would point out that the City of  
14 Detroit got the approval of the State of Michigan to pay that  
15 commitment fee from the treasurer's department at the State  
16 of Michigan. It is improper for any of the counsel to say  
17 what the common practice here is with respect to the  
18 disclosure of the commitment fee because, as the unrebutted  
19 testimony is and as everybody is aware, this is the first  
20 time you've ever had a post-petition financing facility in  
21 Chapter 9. 364(b) does not apply in Chapter 9. The City of  
22 Detroit can go out and get unsecured financing from Barclays  
23 or anybody else and pay whatever commitment fee it wants and  
24 do that without even getting your Honor's approval under  
25 364(b) because it doesn't apply in Chapter 9. It's only

1 because we need to -- we need to grant superpriority  
2 administrative status and liens to get the financing that we  
3 have to come to your Honor and ask for it, but to say that  
4 the normal practice in Chapter 9 is to have to disclose the  
5 commitment fees is just flat out wrong empirically,  
6 historically because it's never been done before and  
7 logically because 364(b) doesn't apply, and neither does 363.  
8 When he talk -- when counsel talks about what was happening  
9 in ResCap and in Patriot and any other Chapter 11 case,  
10 you're dealing with a situation where 363 applies, and the  
11 debtor is prohibited by 363 from paying a commitment fee  
12 unless it first gets Bankruptcy Court approval because it's  
13 out of the ordinary course of business, and so in order to  
14 get Bankruptcy Court approval, you have to tell the Court  
15 what you're asking the Court to approve.

16 THE COURT: And what's the approval you're asking  
17 for here?

18 MR. HAMILTON: Granting super administrative -- the  
19 need -- the necessity of granting super administrative  
20 priority status and liens in order to obtain the financing we  
21 need in order to fund the forbearance agreement, assuming  
22 it's approved, and --

23 THE COURT: So you're not going to ask the Court to  
24 approve the interest rate?

25 MR. HAMILTON: That will be part of the approval

1 process.

2 THE COURT: So you are going to ask the Court to  
3 approve the interest rate?

4 MR. HAMILTON: Interest rate separate from  
5 commitment fee, your Honor, yes. The interest rate is part  
6 of the financing.

7 THE COURT: Well, but your own witnesses testified  
8 that they are intimately interrelated.

9 MR. HAMILTON: I believe he said in their pricing it  
10 was interrelated. Now when we come to you and ask for  
11 approval, even if you disapprove the financing, we still got  
12 to pay the commitment fee. It's done. The commitment fee  
13 is --

14 THE COURT: You don't want to hear my comment on  
15 that.

16 MR. HAMILTON: I understand your Honor's  
17 frustration, and, quite frankly, the commitment fee, while  
18 technically it's not relevant in that regard -- we're going  
19 to pay it either way -- it is arguably, as counsel suggested,  
20 relevant to the good faith finding. If you're paying some  
21 exorbitant commitment fee to Barclays, you might find this  
22 was not done in good faith.

23 THE COURT: So how do I litigate that without giving  
24 it to the objecting parties?

25 MR. HAMILTON: We can give it to the objecting



1 parties under a confi. We just shouldn't tell the entire  
2 public. Again, today is just to file the letter under seal.  
3 We aren't saying they can't get the commitment fee figures  
4 under a confi under any circumstances. That should be worked  
5 out between us, Barclays, and the objectors, and we believe  
6 that we've offered, I believe -- we've suggested that if  
7 objectors want to share it with professionals, including  
8 expert witnesses, to give testimony as to whether or not the  
9 commitment fee is above or below market, that ought to be  
10 able to be worked out. What we're saying today is it should  
11 not be filed on the public docket for all the reasons that  
12 Mr. Saakvitne detailed on the stand. And that's the end of  
13 my argument, your Honor.

14 THE COURT: All right. Thank you. Did you want to  
15 speak, sir? Go ahead. I apologize. Go ahead.

16 MR. SLIFKIN: May I have a moment? Thank you, your  
17 Honor.

18 REBUTTAL ARGUMENT

19 MR. SLIFKIN: I'll be brief, but let me just echo  
20 what counsel for the city said with respect to there being,  
21 you know, all sorts of different issues being raised here  
22 which actually all apply to some different motions before  
23 your Honor and some motions that I believe haven't even been  
24 made yet with respect to confidentiality orders. The motion  
25 here is a motion under 107(b). The issue under the statute

1 is whether this document contains confidential commercial  
2 information, and the issue under the statute is is that  
3 something where disclosure would cause commercial injury to  
4 an interested party, would it provide an unfair advantage to  
5 the competitors of that party. If the answer is "yes" to  
6 those questions, then the statute says the Court shall seal  
7 it. It is left for another day whether or not in order to  
8 facilitate your Honor's decision-making it ought to be given  
9 to objectors, other interested parties, and the position of  
10 Barclays on that is that can be handled through appropriate  
11 confidentiality orders and stipulations and orders. You  
12 should be aware, your Honor, that, you know, there, of  
13 course, is the committee of retirees and so forth, and we  
14 understand their position, but many of the people who came to  
15 argue at this podium today such as FGIC, such as Syncora, and  
16 I believe others have made plain in their own papers that  
17 they put in competing post-petition financing bids at the  
18 time Barclays did, so by their own admission they are  
19 competitors of Barclays. No one today has said we're not a  
20 competitor. No one has said we're not going to be in future  
21 syndication -- future DIP situations nor have they said  
22 they're not going to try and purchase some of the securities  
23 in a potential syndication.

24 THE COURT: Well, but where's the competitive harm  
25 from disclosure?

1 MR. SLIFKIN: The competitive harm from disclosure  
2 of the fee is that people will now know what Barclays' fees  
3 are, what its structure is, what its methodology is, so that  
4 they can --

5 THE COURT: So it drives down the fee.

6 MR. SLIFKIN: I'm sorry.

7 THE COURT: So it drives down everyone's fees.

8 MR. SLIFKIN: Potentially. That's --

9 THE COURT: Wouldn't your witness --

10 MR. SLIFKIN: -- not entirely clear, your Honor.

11 THE COURT: Wouldn't your witness testify then or  
12 didn't your witness testify that that would just have the  
13 effect of increasing the interest rate?

14 MR. SLIFKIN: Potentially. We don't know what's  
15 going to happen, your Honor, but the standard is commercial  
16 injury, commercial injury to Barclays, unfair competitive  
17 advantage to Barclays' competitors. That's the standard in  
18 the statute.

19 THE COURT: Right, but that would be in the next  
20 case; right? There would be no competitive injury to  
21 Barclays in this case.

22 MR. SLIFKIN: Well, that's not entirely clear, your  
23 Honor. It's still open for these people to come in and  
24 propose an alternative DIP financing.

25 THE COURT: It is?

1 MR. SLIFKIN: They can come in and do it if they  
2 like. There's nothing to prevent them.

3 THE COURT: Except that the city wouldn't listen to  
4 it.

5 MR. SLIFKIN: I can't speak for the city. Depends  
6 what terms they offer, your Honor, but none of that matters.  
7 None of that matters with respect to what the statute says.  
8 The statute talks about commercial information, right, as it  
9 talks about trade --

10 THE COURT: Confidential commercial information,  
11 yes.

12 MR. SLIFKIN: -- as it talks about trade secrets and  
13 so on and so forth. It may be that there's no harm from  
14 revealing a trade secret in this proceeding, but it could  
15 well be harmful in some other competitive environment. It's  
16 no different here, your Honor.

17 THE COURT: Question. Where's the harm to Barclays  
18 if this is disclosed in this case? What I heard was  
19 competitors will know what the fee structure is and will  
20 underbid it in the next case.

21 MR. SLIFKIN: Yes.

22 THE COURT: Okay. So Barclays will have to lower  
23 its fees in the next case, but wouldn't that just have the  
24 impact of increasing the interest rate in the next case to  
25 make up for it?

1 MR. SLIFKIN: I can't say that, your Honor. I don't  
2 know that.

3 THE COURT: What your witness said --

4 MR. SLIFKIN: Well, I'm not sure that is entirely  
5 what he said, your Honor.

6 THE COURT: Tell me what you think he said then.

7 MR. SLIFKIN: I think he said that it would chill  
8 the entire market; right? I understand what your Honor --

9 THE COURT: Okay. Okay. It'll chill the entire  
10 market. How is that injury to Barclays? Hurts a lot of  
11 debtors in possession. Hurts the next Detroit case, heaven  
12 forbid.

13 MR. SLIFKIN: As your Honor said quite correctly,  
14 Barclays is in the business -- has for its shareholders to  
15 make money. If Barclays is impaired in making money in any  
16 situation, that is a competitive injury. It just is.

17 THE COURT: It can't find someplace else to lend  
18 \$350 billion?

19 MR. SLIFKIN: Million.

20 THE COURT: Million.

21 MR. SLIFKIN: Million, million, million.

22 THE COURT: Correction accepted.

23 MR. SLIFKIN: They're in the municipal lending  
24 business, your Honor. That's the business they're in.

25 THE COURT: Well, but they're in lots of businesses.

1 MR. SLIFKIN: Well, yeah, but --

2 THE COURT: Yeah.

3 MR. SLIFKIN: -- under that analysis, then nobody  
4 ever suffers commercial injury because you could always just  
5 go into a different business; right? That I think proves too  
6 much. I think we have to take as granted as a baseline the  
7 business that Barclays is in and whether this business will  
8 be harmed or not.

9 THE COURT: Where's the reasonable expectation of  
10 privacy given FOIA?

11 MR. SLIFKIN: Well, FOIA is something that I --  
12 certainly Michigan FOIA is not something on which I would  
13 claim any expertise. It is by no means clear to us that FOIA  
14 applies here.

15 THE COURT: Why wouldn't it?

16 MR. SLIFKIN: Well, I believe -- again, I haven't --  
17 I'm not personally involved in this, but I understand that  
18 Barclays is sending a FOIA confidentiality letter or may have  
19 already done so to the city, and that issue needs to be  
20 litigated, you know, in the future. I don't think -- I don't  
21 think one can -- ought to predict that ultimate analysis in  
22 order to decide this motion and essentially then moot that  
23 analysis like rather than have that analysis play out in the  
24 appropriate forum with the appropriate, you know, ability to  
25 defend yourself.

1 THE COURT: What if the Court determines that it's  
2 reasonably clear that this is disclosable under FOIA? Then  
3 where's the reasonable expectation --

4 MR. SLIFKIN: Well, you see, that's --

5 THE COURT: -- of confidentiality?

6 MR. SLIFKIN: -- what I believe the Court should not  
7 do. I think that would be inappropriate, you know. We  
8 know --

9 THE COURT: Why?

10 MR. SLIFKIN: Why? Because --

11 THE COURT: Why not just read the statute and see if  
12 it applies or not?

13 MR. SLIFKIN: Because under FOIA there are certain  
14 procedures and certain protections and certain submissions  
15 the parties can make, and I believe that it's only  
16 appropriate in the interest of due process for that to be  
17 followed.

18 THE COURT: And can you name one that might help  
19 your client here other than the one that the city identified?

20 MR. SLIFKIN: Well, as I said, you have me at a loss  
21 because I haven't prepared on FOIA. I prepared on 107(b).

22 THE COURT: It's not me that has you at a loss,  
23 counsel.

24 MR. SLIFKIN: I'm sorry, your Honor.

25 THE COURT: It's not me that has you at a loss.

1 MR. SLIFKIN: Well, you appear to be --

2 THE COURT: I'd like --

3 MR. SLIFKIN: -- prejudging the FOIA issue, and I  
4 don't think that's appropriate, your Honor. I think the  
5 record that is here today is the -- in these municipal  
6 financings, right -- this stuff is kept confidential. Now,  
7 is it kept confidential in debtor in possession municipal  
8 financings? Well, there's no history on that, your Honor.  
9 Is it kept --

10 THE COURT: Well, you accept the proposition that  
11 there's no history of that in Chapter 9 DIP financings.

12 MR. SLIFKIN: In Chapter 9. I was about to say that  
13 in Chapter 11, you know, whatever the local rules of the  
14 Southern District of New York say, we know that there are a  
15 whole series of cases --

16 THE COURT: Well, given --

17 MR. SLIFKIN: -- where this information is filed  
18 under seal.

19 THE COURT: Given what counsel for the city has said  
20 here today about the approval that's being requested under  
21 Section 364 in this case, why should the rule be any  
22 different here than in Chapter 11 where the approval is  
23 functionally equivalent?

24 MR. SLIFKIN: I'm not suggesting the rule should be  
25 any different. That's why we've cited a series of cases



1 where this is sealed. The rule is 107(b). The rule is  
2 exactly the same. It's 107(b). There are numerous courts  
3 who have accepted that this is confidential information under  
4 107(b), and --

5 THE COURT: You interpret the Southern District of  
6 New York rules differently?

7 MR. SLIFKIN: No.

8 THE COURT: What am I missing here?

9 MR. SLIFKIN: That's simply the boilerplate local  
10 rules. It doesn't say we're writing out 107(b). The  
11 107(b) -- that's just like this is the presumption. Okay.  
12 That's not controversial. We understand that's the  
13 presumption. Then you go to 107(b) and say if it's  
14 confidential commercial information, which numerous courts  
15 have said this is, then you go to the second part, it shall  
16 be sealed, and the Second Circuit, which obviously governs  
17 there, has been very clear that is mandatory.

18 THE COURT: What one Chapter 11 case do you think is  
19 the strongest case for your position here?

20 MR. SLIFKIN: Would you allow me just to pull up  
21 those papers?

22 THE COURT: Yes, of course.

23 MR. SLIFKIN: We would refer your Honor -- you have  
24 to give me a moment because I'm getting used --

25 THE COURT: Okay. Take your time.

1 MR. SLIFKIN: -- to my new glasses.

2 THE COURT: Okay.

3 MR. SLIFKIN: We would refer your Honor in  
4 particular to Re. in Tribune in the District of Delaware.

5 THE COURT: Have you got a case number on that?

6 MR. SLIFKIN: Yes, your Honor. It's Case Number 08-  
7 13141.

8 THE COURT: And a particular docket -- a docket --

9 MR. SLIFKIN: Docket Entry 62.

10 THE COURT: I'm sorry.

11 MR. SLIFKIN: Docket Entry 62 in that case.

12 THE COURT: 62. Okay.

13 MR. SLIFKIN: And that's Bankruptcy Court for the  
14 District of Delaware, December 10th, 2008.

15 THE COURT: I'll have a look at that.

16 MR. SLIFKIN: Thank you very much, your Honor.

17 THE COURT: Thank you. Okay. I will take this  
18 under advisement until 2:30, and we will get this matter  
19 resolved at that time before we hear the one motion that is  
20 left for the two o'clock call, which is the bar date motion.

21 I do want to ask counsel to cooperate with us with  
22 this. It appears that after the conclusion of last Friday's  
23 eligibility hearing, there were things left in the courtroom,  
24 and all of that stuff really needs to be removed from the  
25 courtroom right away today because, as you know, we are just

1 guests here, and so we'd like to leave the courtroom in the  
2 same condition in which it was presented to us, and so really  
3 anything that is left at the conclusion of court today will  
4 have to be disposed of, so please take everything out. And  
5 we'll be in recess or not --

6 MR. SHERWOOD: Very briefly, your Honor, I just  
7 wanted to politely remind the Court that there was another  
8 motion on the 11 o'clock docket.

9 THE COURT: Oh, there was. That's right. I forgot  
10 that. All right. Well, let's take that up at 2:30 as well.  
11 Is that all right?

12 MR. SHERWOOD: Very well.

13 THE COURT: And let's be sure we know what that was.  
14 That's the discovery motion, yes. All right. So we'll do  
15 that one before we do the bar motion.

16 MR. SHERWOOD: Absolutely.

17 THE COURT: Thank you for reminding me of that, and  
18 now we will be in recess.

19 THE CLERK: All rise. Court is in recess.

20 (Recess at 1:33 p.m. until 2:30 p.m.)

21 THE CLERK: Court is in session. Please be seated.  
22 Recalling Case Number 13-53846, City of Detroit, Michigan.

23 THE COURT: The matter is before the Court on a  
24 motion filed by the city for an order allowing it to file on  
25 the Court's docket its fee letter from Barclays under seal

1 under 11 U.S.C., Section 107(b). That section states in  
2 pertinent part, quote, "On request of a party in interest,  
3 the bankruptcy court shall protect an entity with respect to  
4 a trade secret or confidential research, development, or  
5 commercial information," close quote.

6 In response to the motion, several objections were  
7 filed. By its plain language, the statutory -- the statute  
8 is mandatory in regard to confidential commercial  
9 information, and so the issue before the Court is whether  
10 this fee letter is confidential commercial information. More  
11 specifically, the issue is whether it is confidential.

12 The Court concludes that when the information is in  
13 the hands of a Michigan city, as here, its confidentiality is  
14 controlled by law, and in Michigan that law is the Freedom of  
15 Information Act. Under that act, information in the hands of  
16 a Michigan city, as here, is subject to full disclosure  
17 unless it is exempt from disclosure under MCLA 15.243. The  
18 Court concludes that none of the exemptions in that section  
19 apply to this fee letter, and, therefore, it is subject to  
20 disclosure, and, therefore, it is not confidential. The  
21 closest subsection is -- of those that establish exemption is  
22 Subsection (i), but that subsection only exempts bids or  
23 proposals until the deadline for submission has expired. In  
24 this case, even if the fee letter qualifies as a bid or a  
25 proposal, which seems to the Court dubious, it is, in any

1 event, clear that the time for submission has passed. All of  
2 the witnesses here testified that the city is committed to  
3 its agreement with Barclays subject only to approval of the  
4 Court. Therefore, the Court concludes that this fee  
5 agreement would be subject to the Michigan Freedom of  
6 Information Act and, therefore, is not, as a matter of law,  
7 confidential.

8           Given that this information is subject to disclosure  
9 under the Michigan Freedom of Information Act, the fact that  
10 Barclays for its own competitive reasons wants it to be  
11 confidential or thinks that it should be or has even  
12 pronounced it to be confidential is really quite irrelevant.  
13 It's even irrelevant that the city may have agreed to keep it  
14 confidential because there's nothing in the Freedom of  
15 Information Act that exempts material that is subject to a  
16 confidentiality agreement between a private party and a  
17 public institution like the City of Detroit or that permits  
18 enforcement of such a confidentiality agreement.

19           Now, could the State of Michigan decide that because  
20 of the potential costs of the disclosure of an agreement like  
21 this, the Freedom of Information Act should be amended to  
22 provide for the nondisclosure and for the confidentiality of  
23 these agreements? Of course, it could, but any such  
24 agreement would be subject itself -- or excuse me -- any such  
25 amendment itself would be subject to the democratic process.

1 Nevertheless, at this point in time, it's clear enough that  
2 there is no such exemption from Michigan's Freedom of  
3 Information Act and that, therefore, this letter is not  
4 confidential commercial information. Accordingly, the motion  
5 is denied. The Court will prepare an order.

6 (Proceedings concluded at 2:36 p.m.)

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I certify that the foregoing is a correct transcript from the sound recording of the proceedings in the above-entitled matter.

/s/ Lois Garrett

November 20, 2013

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 Lois Garrett

**Exhibit B**

**Exit Engagement Letter**



BARCLAYS CAPITAL INC.

PERSONAL AND CONFIDENTIAL

October 6, 2013

The City of Detroit, Michigan  
c/o Norma Corio  
Co-President and Managing Director  
Miller Buckfire & Co., LLC  
601 Lexington Avenue, 22nd Floor  
New York, New York 10022

Engagement Letter for Exit Financing

Dear Ms. Corio:

The City of Detroit, Michigan (the “City” or “you”) has advised Barclays Capital, Inc. (“Barclays” and together with the City, the “Engagement Parties”) that the City filed a voluntary petition on July 18, 2013 seeking relief under the provisions of chapter 9 of title 11 of the United States Code in the U.S. Bankruptcy Court for the Eastern District of Michigan (the “Bankruptcy Court”). The City’s bankruptcy case bears Case No. 13-53846 (the “Bankruptcy Case”).

You have further advised us that you currently anticipate that the City will issue (or another entity will issue on behalf of the City) notes or bonds or similar securities or evidences of indebtedness, through public distribution or private placement or otherwise (the “Exit Notes”), pursuant to a plan of adjustment in the Bankruptcy Case or otherwise (the “Exit Financing”), the proceeds of which will be used to repay debt incurred during the Bankruptcy Case (including, without limitation, the Post-Petition Facility but excluding debt in respect of the Detroit Water and Sewerage Department) and, if necessary, pay other debt and claims outstanding at the time the City exits the Bankruptcy Case.

1. Engagement

- (a) This letter agreement (this “Engagement Letter”) is to confirm your and our understanding with respect to our engagement in respect of the Exit Financing.
- (b) Subject to the terms and conditions of this Engagement Letter, you agree that Barclays will have the right (but not the obligation) to act as exclusive and sole bookrunner, underwriter and/or placement agent (or any similar role applicable to the specific form of Exit Financing) with respect to the Exit Financing as set forth in this Engagement Letter. Pricing in respect of the Exit Financing will reflect competitive market rates as of the time of the Exit Financing.

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- (c) You shall have no right to appoint any other financial institution to act as bookrunner, underwriter and/or placement agent (or any similar role applicable to the specific form of Exit Financing), no other financial institution shall have any title or role, and no other financial institution shall receive any consideration, in each case, in connection with the Exit Financing, including with respect to any direct sale or other form of transaction.
- (d) Barclays's advertising name will appear at the bottom center of the front page of any offering or information memorandum related to the Exit Financing. Barclays shall have the sole responsibility, subject to input from the City, to (i) establish the schedule for investor meetings, (ii) coordinate all pre-marketing activity, (iii) coordinate roadshow logistics, (iv) coordinate the final determination of the interest rate to be recommended in connection with the Exit Financing, (v) coordinate the final allocation of any commitments or notes issued in connection with the Exit Financing, (vi) if applicable, act as billing and delivery agent and (vii) if applicable, act as stabilization agent.
- (e) Our engagement hereunder, and our right to act in respect of the Exit Financing, is on an exclusive basis. During the term of this Engagement Letter (which shall continue until terminated pursuant to Section 9), you and your agents and representatives will not approach, initiate, solicit or enter into any discussions or negotiations with or mandate or appoint any bank or financial institution or other person or entity to arrange or participate in any Exit Financing, including, without limitation, through the issuance, offering or sale of any debt securities (whether or not similar to the Exit Financing) to, or the incurrence of loans from, any third parties, in each case except through Barclays or its designated affiliates. Notwithstanding anything herein to the contrary, to the extent the City violates this Section 1(e), Barclays' sole and exclusive remedy is the fee provided for in Section 6(c) hereof.
- (f) Notwithstanding any other provision of this Engagement Letter, you acknowledge that Barclays will not render any tax, accounting, legal or regulatory advice in connection with any Exit Financing, and you acknowledge that you will consult with and rely on your own advisors regarding those matters.

## 2. Cooperation

- (a) In connection with the Exit Financing, the City will co-operate fully with Barclays and its counsel in connection with, and cause its agents, representatives and advisors to be reasonably available for, due diligence and drafting meetings and make available to Barclays any other documentation Barclays may reasonably request in respect of the Exit Financing, subject to applicable laws and regulations governing the provision and disclosure of such information.
- (b) In anticipation of the final sale of the Exit Notes to Barclays in respect of a distribution subject to Paragraph (b) of Securities and Exchange Commission Rule 15c2-12, as amended ("**Rule 15c2-12**"), but only if Rule 15c2-12 is applicable to such offering and sale, the City shall prepare a preliminary official statement (the "**Preliminary Official Statement**"), in the form required by then-current market

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practice and in order to comply with all securities and state laws requirements at the time of the sale date and the delivery date of the Exit Notes. The City shall, by no later than the date required by then-current market practice or securities or state law requirements (i) deliver to Barclays, in such manner as Barclays and its counsel shall reasonably request, a sufficient number of copies of the Preliminary Official Statement in "final" form as required by Paragraph (b)(1) of Rule 15c2-12. The City shall deliver, or shall cause to be delivered, to Barclays, at or prior to the delivery date of the Exit Notes, a sufficient number of copies of the final Official Statement in substantially the form of the Preliminary Official Statement with only such changes and insertions therein from the Preliminary Official Statement as shall have been approved by Barclays, to enable Barclays to comply with Rule 15c2-12. The City will not be required to provide any "10b-5 representations" with respect to the Preliminary Official Statement, but shall only be required to deem the Preliminary Official Statement final in accordance with the terms of Rule 10b-5. For the avoidance of doubt, the City shall be required to provide customary "10b-5 representations" with respect to the final Official Statement.

- (c) To the extent required by law, the City will enter into one or more agreements or other legally binding continuing disclosure obligations for the benefit of the holders of the Exit Notes, obligating the City to provide secondary market disclosure as required by Rule 15c2-12.
- (d) The City will furnish such information, will execute and deliver such instruments and documents and will take such other action in cooperation with Barclays as Barclays may reasonably request at no cost to the City to: (i) qualify the Exit Notes for offer and sale under the "Blue Sky" or other securities laws and regulations of such states and other jurisdictions of the United States of America as Barclays may (in its sole discretion) designate; (ii) determine the eligibility of the Exit Notes for investment under the laws of states and other jurisdictions as Barclays may (in its discretion upon consultation with, and agreement of the City) designate, and to provide for the continuance of such qualifications or exemptions in effect for so long as required for distribution of Exit Notes; and (iii) allow Barclays to sell the Exit Notes, each in accordance with in accordance with market practice and securities and state law at such time.
- (e) The City shall engage nationally recognized bond counsel ("**Bond Counsel**") and Bond Counsel shall provide, at closing, an opinion, reasonably acceptable to Barclays, with respect to the validity of the Exit Notes and, if applicable, the exclusion from gross income of the owners of the Exit Notes of interest payable on the Exit Notes, for federal income tax purposes and to the effect that the Exit Notes are exempt from registration under the Securities Act and the related financing documents are exempt from qualification under the Trust Indenture Act of 1939, as amended.
- (f) The City shall, to the extent required by law, properly and timely file, with the assistance of Bond Counsel, Form 8038-G with the Internal Revenue Service pursuant to Section 149(e) of the Internal Revenue Code.

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- (g) The City shall, if applicable, provide a non-arbitrage certificate or tax regulatory agreement prepared by Bond Counsel, which shall set forth the facts, estimates and circumstances sufficient to satisfy the criteria which are necessary under the Internal Revenue Code, to support the opinion of Bond Counsel that the interest on the Exit Notes is excludable from gross income to the beneficial owners thereof under the Internal Revenue Code, if such Exit Notes are issued on a tax-exempt basis.
- (h) If the Exit Notes are issued on a tax-exempt basis, the City shall make all customary covenants required by Barclays with respect to the tax-exempt status of the Exit Notes, including, without limiting the foregoing, covenants to the effect that (i) the City will not take, or omit to take, any action lawful and within its power to take, which action or omission would cause interest on any Exit Note to become subject to federal income taxes, (ii) the City will not permit any of the proceeds of the Exit Notes to be used in any manner that would cause any Exit Notes to constitute a "private activity bond" within the meaning of Section 141 of the Internal Revenue Code, (iii) the City will not permit any of the proceeds of the Exit Notes or other moneys to be invested in any manner that would cause any Exit Note to constitute an "arbitrage bond" within the meaning of Section 148 of the Internal Revenue Code or a "hedge bond" within the meaning of Section 149(g) of the Internal Revenue Code and (iv) the City will comply with the provisions of Section 148(f) of the Internal Revenue Code relating to the rebate of certain investment earnings at periodic intervals to the United States of America.
- (i) Documentation in respect of the Exit Financing will contain such conditions precedent, representations, warranties, events of default and other terms and conditions as may be agreed among the parties, and which are customary for transactions of this nature.
- (j) The City shall provide such additional legal opinions, instruments and other documents as Bond Counsel, Barclays or Barclays's counsel may reasonably request in order to conform to then-current market practice, or to satisfy Barclays's internal policies or to comply with all securities, tax and state laws requirements and all other laws, rules and regulations applicable to a public offering of this type.

### 3. Clear Market

You agree that you will ensure that no mandate or authorization to arrange any Exit Financing in the capital or financial markets shall be awarded to any financial institution or group of financial institutions other than to Barclays in accordance with this Engagement Letter. Notwithstanding anything herein to the contrary, to the extent the City violates this Section 3, Barclays' sole and exclusive remedy is the fee provided for in Section 6(c) hereof.

### 4. No Commitment

- (a) Barclays shall not be obliged by this Engagement Letter to underwrite, purchase, syndicate or place the Exit Notes or any other debt or provide any other financing. If an offering of Exit Notes is undertaken, or any other debt financing is arranged, the

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contractual arrangements will be reflected in one or more underwriting, purchase, credit or other agreements between the City and the parties thereto (each, a "**Financing Agreement**"). You acknowledge that Barclays will have no obligation to buy or place the Exit Notes or to arrange or participate in the making of any other financing available, in each case, except upon signing of such definitive agreements.

- (b) The execution of any Financing Agreement will be subject, in the complete discretion of Barclays, to, among other things, (i) satisfactory completion of a due diligence review, (ii) the receipt of all necessary internal and external approvals (including internal commitment committee approval), (iii) market conditions which, in Barclays's judgment, are satisfactory, and (iv) compliance by the City with this Engagement Letter and such definitive agreements. Each Financing Agreement will be consistent with this Engagement Letter to the extent permitted by law and otherwise will include the final terms of the financing, including the transaction size, structure and pricing terms, as well as other reasonable and customary terms and conditions agreed to by the City, including provisions relating to indemnity, conditions precedent for the agreement to become effective and certain termination events. The provisions of this Section 4(b) shall remain effective until a Financing Agreement is executed and thereafter this Section 4(b) shall be superseded by such Financing Agreement to the extent provided for therein.

5. Conflicts of Interest

You acknowledge that Barclays is engaged in securities trading and brokerage activities, as well as providing investment banking and financial advisory services. In the ordinary course of trading and brokerage activities and the production of research, Barclays and its affiliates may at any time hold positions, and may trade or otherwise effect transactions, for their own account or the accounts of customers, in debt securities of entities that may be involved in the transactions contemplated hereby. You acknowledge and agree that Barclays may be prevented, by reason of law, duties of confidentiality owed to other persons, the rules of any regulatory authority or Barclays's internal controls, from using or disclosing to you any information known to Barclays in connection with this Engagement Letter or the transactions contemplated hereby. You agree, so as expressly to override any duties, obligations or restrictions which would otherwise be implied by law or regulation, that in carrying out this Engagement Letter, Barclays will not be required to have regard to or rely on any material information from other clients which is confidential which may be relevant to you or any material information obtained by Barclays while acting for another client which has interests which conflict with your interests in relation to the transactions contemplated hereby.

6. Fees; Expenses

- (a) You agree to pay to Barclays an aggregate underwriting discount, placement fee, initial purchaser's discount or arrangement fee with respect to the Exit Financing (the "**Underwriting Spread**") equal to (i) in the event the Exit Financing receives at least one investment grade public rating from either Moody's Investors Service or Standard & Poor's, 0.50% of the aggregate principal amount of the Exit Financing and (ii)

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otherwise, 0.75% of the aggregate principal amount of the Exit Financing, in each case to be deducted from the gross proceeds thereof.

- (b) In addition to the Underwriting Spread, whether or not an Exit Financing is completed or any financing is arranged, you shall pay all reasonable and documented out-of-pocket costs and expenses of Barclays, if any, in connection with the Exit Financing, including the reasonable fees, expenses and disbursements of legal counsel. You agree that you shall be responsible for all your own legal, accounting and other agents' or advisors' fees and costs, including all other expenses related to the transactions contemplated hereby.
- (c) In the event that you or any person on behalf of you completes an Exit Financing or any bond, note, bank, bridge or other syndicated credit or other financing in lieu of the Exit Financing (collectively, the "**Alternative Financing**") the proceeds of which are to be used in whole or in part to repay debt incurred during the Bankruptcy Case (including, without limitation, the Post-Petition Facility) and/or pay other debt and claims outstanding at the time the City exits the Bankruptcy Case, in each case, without providing Barclays the right to provide, arrange, place or underwrite such Exit Financing or Alternative Financing, then you agree, unless Barclays has terminated this Engagement Letter or breached its obligation to provide the Exit Financing on the terms set forth herein, to pay to Barclays an amount equal to 0.75% of the aggregate outstanding amount of the Post-Petition Facility immediately prior to the time the City exits the Bankruptcy Case, which payment will be made on the date of the closing of such Exit Financing or Alternative Financing from the proceeds of thereof.
- (d) To the extent applicable, all amounts payable hereunder are exclusive of value-added tax or any similar taxes ("**VAT**"). All amounts charged or required to be reimbursed hereunder will be invoiced together with VAT, where required, and such VAT shall be for your account. In addition, all such amounts shall be paid free and clear of, and without any deduction or withholding for or on account of, any current or future taxes, levies, imposts, duties, charges or other deductions or withholdings levied in any jurisdiction from or through which payment is made or where the payer is located unless such deduction or withholding is required by applicable law, in which event, you agree to pay additional amounts so that the persons entitled to such payments will receive the amount that such persons would otherwise have received but for such deduction or withholding.

7. Information

- (a) You agree to use your best efforts, to the extent permitted by law, to (a) furnish or cause to be furnished to Barclays such information as Barclays may reasonably request for inclusion in any document to be used in connection with the Exit Financing (all such information so furnished being the "**Information**"), (b) provide all information to Barclays and its advisors as Barclays shall, and such advisors shall, reasonably request in connection with legal and business due diligence, and (c) furnish or cause to be furnished to Barclays all information concerning the transactions contemplated hereby and the operations and affairs of the City which is,

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in the opinion of Barclays, material to the proper performance under this Engagement Letter and all such further information as Barclays may reasonably request. You recognize and confirm that Barclays (a) will rely on the Information and on information available from generally recognized public sources in performing the services contemplated by this Engagement Letter without having independently verified the same, (b) does not assume responsibility for the accuracy or completeness of the Information and (c) will not make an appraisal of any assets or liabilities of the City. You will promptly advise Barclays in writing if you become aware that any Information previously provided has become inaccurate or misleading in any material respect or is required to be updated in any material respect.

- (b) Barclays may share any Information and any other information or matters relating to you and the transactions contemplated hereby with any of their affiliates, and any such affiliate may likewise share information relating to you and the transactions contemplated hereby with Barclays, in each case, on a confidential and need-to-know basis in connection with the transactions contemplated hereby.

8. Indemnity

- (a) You agree to indemnify and hold harmless Barclays (in each case, for itself and for each Indemnified Party) and its affiliates and their respective directors, officers, employees, agents and controlling persons (Barclays and each such person being an "Indemnified Party") from and against any and all losses, claims, damages, liabilities, costs and expenses whatsoever, joint or several, to which any such Indemnified Party may become subject caused by, relating to or arising out of any untrue statement or alleged untrue statement of a material fact contained in the final Official Statement, furnished or made available by you or your agents or representatives or the omission or the alleged omission to state therein a material fact necessary in order to make the statements therein not misleading, in the light of the circumstances under which they were made; provided, however, that the City will not be liable in any such case to the extent that any such loss, claim, damage, liability or action arises out of or is based upon an untrue statement or omission or alleged untrue statement or omission made in the Official Statement either (a) in reliance upon and in conformity with written information supplied to the City by Barclays specifically for inclusion therein, unless the City has independent knowledge as to the truth of such written information, or (b) contained under the captions "BOOK-ENTRY ONLY SYSTEM," "TAX EXEMPTION," "RATINGS," or "UNDERWRITING" or similarly titled sections except to the extent that information under such captions was based upon information supplied by, or solely within the independent knowledge of, the City, and will reimburse each Indemnified Party to the extent permitted by law for all expenses (including counsel fees and expenses) as they are incurred by an Indemnified Party in connection with the investigation of, preparation for or defense of any pending or threatened claim or any action or proceeding arising therefrom, whether or not such Indemnified Party is a party thereto and whether or not such claim, action or proceeding is initiated or brought by or on behalf of the City and whether or not the City is a party thereto. You shall not be liable to any Indemnified Party under clause (ii) of the foregoing indemnification provision to the extent that any loss, claims, damage, liability or expense which is determined by a non-

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appealable judgment of a court of competent jurisdiction to have resulted from such Indemnified Party's willful misconduct or gross negligence. You also agree that no Indemnified Party shall have any liability (whether direct or indirect, in contract or tort or otherwise) to the City or any of its agents or representatives related to or arising out of the appointment of Barclays pursuant to, or the performance by Barclays of the services contemplated by, this Engagement Letter except to the extent that a non-appealable judgment of a court of competent jurisdiction determines that any loss, claim, damage or liability has resulted from Barclays's willful misconduct or negligence, including, without limitation, any material omission or misstatement provided by Barclays provided by it to the City for inclusion into the final Official Statement. In no event shall any Indemnified Party be liable for consequential damages which may be alleged to arise out of or in connection with this Engagement Letter or the transactions contemplated hereby or relating or in any way arising from any proposed or actual use of the proceeds from the Exit Financing or any related matter.

- (b) You agree to notify Barclays promptly after becoming aware of the assertion against you or any of your agents or representatives, or after receipt of notice of the assertion against any other person, of any claim or the commencement of any such action or proceeding relating to any transaction contemplated by this Engagement Letter or its engagement hereunder.
- (c) You agree that, without Barclays's prior written consent, you will not settle, compromise or consent to the entry of any judgment in any pending or threatened claim, action or proceeding in respect of which (i) Barclays or any other Indemnified Party is an actual or potential party to such claim, action or proceeding or (ii) indemnification could be sought under the indemnification provision of this Engagement Letter (whether or not Barclays or any other Indemnified Party is an actual or potential party to such claim, action or proceeding) unless such settlement, compromise or consent includes an unconditional release of each Indemnified Party from all liability arising out of such claim, action or proceeding and does not include a statement as to an admission of fault, culpability or failure to act by or on behalf of any Indemnified Party. Except as set forth above, you further agree that you have no right to settle, compromise, negotiate, consent, make any representation or do anything on behalf of Barclays in any pending or threatened claim, action or proceeding.
- (d) Neither Barclays nor any of its affiliates shall be liable hereunder for any action, failure to act or breach of this Engagement Letter by any person other than itself and nothing in this Engagement Letter or the nature of our services shall be deemed to create a fiduciary or agency relationship between Barclays or its affiliates, on the one hand, and the City or any of its agents or representatives, on the other hand. Furthermore, you agree that you will not institute, support and participate in claims in respect of this Engagement Letter brought personally against any employee, partner, servant or agent of Barclays.

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9. Termination

This Engagement Letter shall terminate on the closing of an Exit Financing or an Alternative Financing. This Engagement Letter may be terminated at any time by Barclays upon at least three business days' prior written notice thereof to that effect. The provisions contained herein relating to confidentiality, the payment of fees, any accrued rights and liabilities and indemnification will survive any such termination.

10. Miscellaneous

- (a) You acknowledge and agree that Barclays has been retained to act for the City to the extent provided herein.
- (b) This Engagement Letter may not be assigned by you without the prior written consent of Barclays.
- (c) You agree that this Engagement Letter including, without limitation, any advice rendered hereunder, is for your confidential use only and will not be disclosed by you to any person other than to your agents, representatives, officers, directors and advisors in connection with the Exit Financing on a confidential and "need to know" basis, except that, following your acceptance hereof, and after providing prior written notice to Barclays and with appropriate redactions as reasonably requested by Barclays, you may make such public disclosures of the terms and conditions hereof as you are required by law, court of law (including the Bankruptcy Court) or legal or regulatory process to make (including as required under Michigan P.A. 436 or Section 36a of the Michigan Home Rule City Act). You agree that you will permit Barclays to review and approve any reference to Barclays contained in any press release, filing or similar public disclosure made in connection herewith or any such press release, filing or public disclosure required to be reviewed and/or approved by Barclays under any applicable law or regulation prior to public release. You acknowledge that Barclays may, at its option, place an announcement in such newspapers and periodicals as it may choose describing its role in connection with the Exit Financing.
- (d) This Engagement Letter shall be governed by, and construed in accordance with, the laws of the State of Michigan.
- (e) This Engagement Letter is issued for your benefit only and no other person or entity (other than the Indemnified Persons) may rely hereon.
- (f) Each of the Engagement Parties hereby irrevocably and unconditionally:
  - (i) submits, for itself and its property, (a) during the pendency of the Bankruptcy Case, to the exclusive jurisdiction of the Bankruptcy Court and (b) after the Bankruptcy Case has been closed, to the non-exclusive jurisdiction of (1) the courts of the State of New York and the United States District Court located in the Borough of Manhattan in New York City and (2) the courts of the State of Michigan and the United States District Court for the Eastern District of Michigan and, in each case of the foregoing, any appellate court from any

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such court, in any action, suit, proceeding or claim arising out of or relating to this Engagement Letter or the transactions contemplated hereby, the performance of services contemplated hereunder, or for recognition or enforcement of any judgment, and agrees that all claims in respect of any such action, suit, proceeding or claim may be heard and determined in such court; provided that suit for the recognition or enforcement of any judgment obtained in any such court may be brought in any other court of competent jurisdiction,

- (ii) waives, to the fullest extent permitted by law, any objection that it may now or hereafter have to the laying of venue of any action, suit, proceeding or claim arising out of or relating to this Engagement Letter, the transactions contemplated hereby or the performance of services contemplated hereunder in any such court,
  - (iii) waives, to the fullest extent permitted by law, the defense of an inconvenient forum to the maintenance of any such action, suit, proceeding or claim in any such court,
  - (iv) agrees to commence any such action, suit, proceeding or claim in such courts, as applicable and
  - (v) agrees that service of any process, summons, notice or document by registered mail addressed to the City or Barclays, as applicable, shall be effective service of process for any such action, suit, proceeding or claim brought in any such court.
- (g) You agree, on behalf of yourself and your agents and representatives, that the foregoing provisions of Section 10(f) above shall also apply to your agents and representatives to the same extent as to you, and Barclays's obligations hereunder are being made in reliance on the foregoing.
- (h) **EACH OF THE ENGAGEMENT PARTIES HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT TO TRIAL BY JURY WITH RESPECT TO ANY ACTION, SUIT, PROCEEDING, CLAIM OR COUNTERCLAIM BROUGHT BY OR ON BEHALF OF ANY PARTY HERETO ARISING IN CONNECTION WITH OR AS A RESULT OF ANY MATTER REFERRED TO IN THIS ENGAGEMENT LETTER OR THE PERFORMANCE OF SERVICES HEREUNDER.**
- (i) If any term, provision, covenant or restriction in this Engagement Letter is held by a court of competent jurisdiction to be invalid, void or unenforceable or against public policy, the remainder of the terms, provisions, covenants and restrictions contained herein shall remain in full force and effect and shall in no way be affected, impaired or invalidated. You and Barclays shall endeavor in good faith negotiations to replace the invalid, void or unenforceable provisions with valid and enforceable provisions the economic effect of which comes as close as possible to that of the invalid, void or unenforceable provisions.

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- (j) This Engagement Letter may be executed in any number of counterparts and by different parties hereto in separate counterparts, each of which when so executed and delivered shall be deemed an original, but all such counterparts together shall constitute one and the same instrument. Delivery of an executed counterpart of a signature page of this letter by facsimile transmission shall be as effective as delivery of a manually signed counterpart hereof.

*[The remainder of this page intentionally left blank]*

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Please confirm that the foregoing correctly sets forth our agreement by signing and returning to Barclays a duplicate copy of this Engagement Letter enclosed herewith.

Very truly yours,

BARCLAYS CAPITAL INC.




by

Name: John Gerbino  
Title: Managing Director

Accepted and agreed to as of  
the date first written above:

THE CITY OF DETROIT, MICHIGAN

By   
Name: KEVIN D. ORR  
Title: EMERGENCY MANAGER

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[[3430711]]

**Exhibit C**

**Email from Anne Marie Langan to Todd Snyder**

---

**From:** Anne Marie Langan  
**To:** Snyder, Todd  
**Cc:** Corley, Irvin  
**Subject:** RE: Syncora Proposal

Todd,  
Council passed a resolution that explains why they voted down the Barclay's proposal and turned down Synagro's proposal.

Attached is the resolution they approved.

While your proposal was clearly an improvement over Barclay's, Council had philosophical issues with this path (DIP financing) as well as the rushed feeling that they just received it and had not had bond counsel review it. I do believe the philosophy overrode all however.  
Just wondering - How long would it have taken to get a complete document? Would a complete document have included the terms plus boilerplate? or would we have had to conduct further negotiations? or would you have waited until you heard from the loan board?

Nice to have worked with you. Question - was Synagro's proposal to the EM much different than the one offered this morning?

Regards,

Anne Marie Langan  
Fiscal Analyst

City of Detroit  
City Council Policy Division

313.224.1078 phone

313.224.2783 fax  
[anne@detroitmi.gov](mailto:anne@detroitmi.gov)

>>> "Snyder, Todd" <todd.snyder@rothschild.com> 10/25/2013 1:44 PM >>>

Irv and Anne Marie,

Can you give me any sense of the expected steps from here so I can report to my client?

**Todd R. Snyder**

**Executive Vice Chairman of North American GFA**

**Co-Chair of the North American Debt Advisory and Restructuring Group**

**Rothschild**

Tel +1 (212) 403-5246

e-mail [todd.snyder@rothschild.com](mailto:todd.snyder@rothschild.com)

1251 Avenue of the Americas, 33rd Floor, New York, NY 10020, USA

**From:** Irvin Corley [mailto:[irvin@detroitmi.gov](mailto:irvin@detroitmi.gov)]

**Sent:** Friday, October 25, 2013 9:47 AM

**To:** Snyder, Todd

**Subject:** Re: Syncora Proposal

I got it. Thanks! We'll keep in touch, Irv

>>> "Snyder, Todd" <[todd.snyder@rothschild.com](mailto:todd.snyder@rothschild.com)> 10/25/2013 8:32 AM >>>

Irv,

We turned it for you late last night. Pls confirm receipt

Best,

Todd

Todd R. Snyder

Executive Vice Chairman of North American GFA / Co-Chair of the North American Debt Advisory and Restructuring Group

Rothschild

Tel +1 (212) 403-5246

e-mail [todd.snyder@rothschild.com](mailto:todd.snyder@rothschild.com)

1251 Avenue of the Americas, 33rd Floor, New York, NY 10020, USA

**From:** Irvin Corley [mailto:[irvin@detroitmi.gov](mailto:irvin@detroitmi.gov)]

**Sent:** Thursday, October 24, 2013 08:42 PM Eastern Standard Time

**To:** Anne Marie Langan <[Anne@detroitmi.gov](mailto:Anne@detroitmi.gov)>; Snyder, Todd

**Cc:** Lakisha Barclift <[BarclifL@atwpo.ci.detroit.mi.us](mailto:BarclifL@atwpo.ci.detroit.mi.us)>; Liz Cabot <[CabotL@detroitmi.gov](mailto:CabotL@detroitmi.gov)>; David Whitaker <[DavidW@detroitmi.gov](mailto:DavidW@detroitmi.gov)>; Jerry Pokorski <[Pokorski@detroitmi.gov](mailto:Pokorski@detroitmi.gov)>



**Subject:** Re: Syncora Proposal

One more from Irv:

No language in Events of Default section of Term Sheet document that states "the city ceases to be under the control of an emergency manager for a period of thirty (30) days unless a Transition Advisory Board or consent agreement reasonably determined by the Purchaser to ensure continued financial responsibility shall have been established" as an event of default.

>>> Anne Marie Langan 10/24/2013 6:42 PM >>>

Todd,

Per our recent phone discussion, you asked us to send you in writing our items of concern:

Page 1 on the DIP Term Sheet -

Maturity - the option to extend should be clarified.

Affirmative Covenant - This should be stricken as it is unacceptable as written.

Collateral - The first bullet point on first priority lien on the art owned by Detroit should be stricken.

Mandatory Redemption - This should be stricken as it is unacceptable as written.

This is not to be construed as a counter-proposal but rather a list of items that when altered may make a proposal from Syncora/Rothschild more attractive as an alternative DIP financing proposal.

Please be mindful that we do not have the authority to accept or not accept any proposals or negotiate on the city's behalf. We will quickly forward any additional offers that you would like to make to Council.

Thank you for your time and consideration,

Anne Marie Langan

Fiscal Analyst

City of Detroit

City Council Policy Division

313.224.1078 phone

313.224.2783 fax

[anne@detroitmi.gov](mailto:anne@detroitmi.gov)

>>> "Rakiter, Michael" <[Michael.Rakiter@Rothschild.com](mailto:Michael.Rakiter@Rothschild.com)> 10/24/2013 3:02 PM >>>

Anne Marie,

Per your discussion with Todd Snyder, please find attached the Syncora DIP term sheet proposal. Additionally, the attachment includes a comparison that highlights the primary improvements in the Syncora proposal versus the Barclays' proposal.

Best regards,

Mike

**Michael Rakiter**

**Associate**

Global Financial Advisory

**Rothschild**

Tel +1.212.403.3788

Mobile +1.917.371.2738

Fax +1.212.403.5408

e-mail [michael.rakiter@rothschild.com](mailto:michael.rakiter@rothschild.com)

1251 Avenue of the Americas, 33rd Floor, New York, NY 10020, USA

Rothschild operates in the USA through Rothschild Inc.



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mill\_Revised LB...

**Exhibit D**

**Hr'g Tr., Nov. 14, 2013, 14:36 ET**

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, . Docket No. 13-53846  
MICHIGAN, .  
 . Detroit, Michigan  
 . November 14, 2013  
Debtor. . 2:36 p.m.  
 . . . . .

HEARING RE. MOTION OF THE OBJECTORS FOR LEAVE TO  
CONDUCT LIMITED DISCOVERY IN CONNECTION WITH MOTION OF  
THE DEBTOR FOR A FINAL ORDER PURSUANT TO 11 U.S.C.  
SEC. 105, 362, 364(c)(1), 364(c)(2), 364(e), 364(f),  
503, 507(a)(2), 904, 921 and 922 (I) APPROVING POST-  
PETITION FINANCING, (II) GRANTING LIENS AND PROVIDING  
SUPERPRIORITY CLAIM STATUS AND (III) MODIFYING  
AUTOMATIC STAY  
BEFORE THE HONORABLE STEVEN W. RHODES  
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor: Jones Day  
By: BRAD B. ERENS  
77 West Wacker  
Chicago, IL 60601-1692  
(312) 782-3939

Jones Day  
By: ROBERT W. HAMILTON  
325 John H McConnell Blvd., Suite 600  
Columbus, OH 43215  
(614) 469-3939

For Detroit Retirement  
Systems - General Retirement System  
of Detroit, Police and Fire Retirement  
System of the City of Detroit: Clark Hill, PLC  
By: ROBERT D. GORDON  
151 South Old Woodward, Suite 200  
Birmingham, MI 48009  
(248) 988-5882

For National Public Finance  
Guarantee Corporation: Sidley Austin, LLP  
By: GUY S. NEAL  
1501 K Street, N.W.  
Washington, DC 20005  
(202) 736-8041

## APPEARANCES (continued):

For Syncora Holdings, Ltd.,  
Syncora Guarantee, Inc., and Syncora Capital Assurance, Inc.:  
Kirkland & Ellis, LLP  
By: STEPHEN HACKNEY  
300 North LaSalle  
Chicago, IL 60654  
(312) 862-2074

For Ambac Assurance Corporation:  
Arent Fox, LLP  
By: CAROL CONNOR COHEN  
1717 K Street, N.W.  
Washington, DC 20036  
(202) 857-6054

Court Recorder:  
Letrice Calloway  
United States Bankruptcy Court  
211 West Fort Street  
21st Floor  
Detroit, MI 48226-3211  
(313) 234-0068

Transcribed By:  
Lois Garrett  
1290 West Barnes Road  
Leslie, MI 49251  
(517) 676-5092

Proceedings recorded by electronic sound recording,  
transcript produced by transcription service.

1 THE COURT: And let's move on and talk about  
2 discovery.

3 MR. HACKNEY: Good afternoon, your Honor. Stephen  
4 Hackney on behalf of Syncora.

5 THE COURT: Yes, sir.

6 MR. HACKNEY: Your Honor, we're here on a motion  
7 that Syncora filed with several other parties joining that  
8 relates to discovery that we'd like to take in anticipation  
9 of the hearing on the motion for post-petition financing that  
10 you spent most of the morning and afternoon discussing.  
11 Before I -- I know that we're running into your next call,  
12 and I will get right into the discovery itself, but I was  
13 wondering if I could --

14 THE COURT: Well, don't worry about that. Don't  
15 feel rushed. I want to --

16 MR. HACKNEY: Okay. I will try.

17 THE COURT: I want to take our time and do this  
18 properly.

19 MR. HACKNEY: I wanted to at the start, if I could,  
20 your Honor, frame the importance of the DIP motion itself to  
21 the case because I think its importance is significant not  
22 only to this case but to other Chapter 9's that may follow,  
23 and I think it's important to think about that in the context  
24 of why we believe discovery is important. As you've heard  
25 today, the proposed DIP loan in question is believed to be

1 the first of its kind. We actually -- our research indicates  
2 that it's not literally the first Chapter 9 DIP loan. Our  
3 research indicates that there have been a couple small DIP  
4 loans in other Chapter 9's, and there was a sizeable one that  
5 was done as part of a plan, but it is the first of its kind  
6 in terms of being the largest and also one I think that is  
7 unabashedly about revitalization of the city in part as  
8 opposed to immediate cash flow needs, so the DIP loan in this  
9 case that's being proposed is significant.

10 It is significant for a second reason, and that is  
11 because the proceeds of the DIP loan, the \$350 million, 230  
12 million about will be used to pay certain creditors outside  
13 of the plan context, and the \$120 million that's going to be  
14 devoted to what are called quality of life initiatives, the  
15 idea of a revitalization of the City of Detroit, a  
16 renaissance on the street, so to speak, is also one that will  
17 be happening outside the plan context, so they're coming to  
18 you on an interim basis between eligibility and confirmation  
19 and saying that they would like to be able to do this today.

20 The reason this is of great sensitivity and concern  
21 to creditors is because if the city pledges away income  
22 streams or assigns them to different parties now, it has  
23 obviously an important impact on the city's ability to later  
24 fairly adjust the debts of creditors like Syncora or the  
25 pensioners or the others, so we perceive there to be



1 significant plan implications by some of these interim  
2 motions that are being brought to the Court, and that is why  
3 this is an area of great focus and concern for creditors, and  
4 that informs somewhat the discovery that we've sought.

5 I believe there is some agreement with the city that  
6 some discovery is appropriate, and I'd like to recite that  
7 for the record and try and narrow it. The city, as I  
8 understand it, is amenable to the idea that the objectors can  
9 obtain discovery into the DIP solicitation process, the DIP  
10 evaluation process, and the process by which the DIP was  
11 submitted to the City Council under PA 436. It's my  
12 understanding, at least, that we have general agreement that  
13 that's okay and also that the city is willing for its  
14 deponents, Mr. Doak and Mr. Moore, to be deposed.

15 Where there is disagreement with respect to the  
16 scope of potential document requests and inquiry is on the  
17 subject of the uses and the need for the quality of life  
18 proceeds, and this is where I will confess I was taken a  
19 little aback by our disagreement on this because the motion  
20 itself is replete with references to Mr. Moore's declaration  
21 but also to a discussion of all of the challenges that the  
22 City of Detroit faces, for example, with respect to blight  
23 remediation, the fire department, the police department, and  
24 IT infrastructure. These are some of the areas where the  
25 city has said it may -- it's not obligating itself to, but it

1 has said it may or that it intends to direct the quality of  
2 life proceeds at these subject matter areas. We believe that  
3 discovery into --

4 THE COURT: Excuse me. Why does Syncora care about  
5 what the city's priorities are in terms of quality of life  
6 spending?

7 MR. HACKNEY: The answer, your Honor, is because, as  
8 a creditor who, you know, expects to see a plan of adjustment  
9 at the end of the case that fairly allocates or fairly  
10 adjusts its debts along with the debts of the others in the  
11 case, the way the city spends its money and the impact or  
12 lack of impact that has on creditor recoveries Syncora  
13 believes is endemic to analyzing whether it is, for example,  
14 within the business judgment, as the city has contended it is  
15 and which is one of the elements under Section 364 or one of  
16 the factors you'll consider, whether it's in the best  
17 interest of creditors, as they have suggested that it is in  
18 their papers and as the order they proposed would find, and  
19 it also goes to whether --

20 THE COURT: Do you think the city is going to ask me  
21 to approve its allocation of how it's going to spend the  
22 proceeds of the loan?

23 MR. HACKNEY: I think that --

24 THE COURT: That makes me sound like a mayor or a  
25 city council.

1 MR. HACKNEY: Well, these -- your questions go right  
2 to the core, I think, of this matter, but also in some  
3 respects of the case, and I was -- let me respond in two  
4 respects, your Honor.

5 THE COURT: Well, we don't have to have an answer  
6 now, but the issue is why have discovery on all of this?

7 MR. HACKNEY: Yeah. So I will answer your question,  
8 which is I know that the city -- or I believe that the city  
9 is taking the position that you're not permitted to consider  
10 either the needs or the uses of the funds and that they have  
11 sovereignty to administer themselves sort of thematically  
12 under Section 904.

13 THE COURT: Is that a proposition you disagree with?

14 MR. HACKNEY: It is. It is because, your Honor, I  
15 acknowledge that under Section 904 that the city has the  
16 right to administer itself without the Bankruptcy Court  
17 interfering. That's the language of Section 904. But where  
18 things change substantially is when you come to this Court  
19 and ask this Court to begin to work the controls of the  
20 Bankruptcy Code to the benefit of the city when they invoke  
21 concepts like obtaining superpriority liens or good faith  
22 assurances to be given to parties so that they're protected  
23 no matter the outcome of various appeals and so on and so  
24 forth. When you come into that context, we believe you've  
25 now entered -- first of all, you've put your dispute --

1 you've consented to the idea that the Bankruptcy Court must  
2 determine whether it's appropriate, and we believe that  
3 unlike a mayor or another political leader who thinks about  
4 the needs of his citizens or her citizens in administering  
5 the body politic, a bankruptcy judge, under Chapter 9 and the  
6 history behind Chapter 9, the legislative purpose, does think  
7 in terms of fairness to creditors, that that is an essential  
8 aspect of the purpose of Chapter 9, and that the bankruptcy  
9 judge is duty bound to consider --

10 THE COURT: The fairness of what, though?

11 MR. HACKNEY: What's that?

12 THE COURT: The fairness of what?

13 MR. HACKNEY: The fairness of the proposed action in  
14 terms of how it will impact creditors. For example, we  
15 believe, your Honor, if I could go back to answer your  
16 question about will you have to involve yourself in assessing  
17 how they propose to use the money and whether they're using  
18 it in the right way, we think that, at a minimum, we should  
19 be entitled to take discovery on the subject but also that  
20 you should consider evidence later that there are less  
21 burdensome ways, for example, for the city to improve the  
22 quality of life in Detroit that may not impair creditor  
23 recoveries or that may not require superpriority liens and  
24 the like, that there are different ways that the money can be  
25 spent so that creditors will obtain either a better return on

1 their -- a better return on their claims. And, for example,  
2 your Honor, this is particularly appropriate when you think  
3 about the concept of Section 364 and its incorporation into  
4 Chapter 9, which hasn't always been part of Chapter 9, but  
5 when it was incorporated, there's some of the legislative  
6 history that suggests that the reason it was a good idea to  
7 incorporate it into Chapter 9 was similar to the reason that  
8 it is a good idea in Chapter 11, which is that post-petition  
9 financing can be used to enhance the value of the estate and  
10 enhance the value to creditors. So we believe that the  
11 question of how the money is being spent is germane to the  
12 question of whether or not it's serving the purposes of  
13 Section 364 even in the Chapter 9 context.

14 And your Court is asking -- the Court is asking  
15 questions that I think are momentous ones. I think the --  
16 formulating the appropriate legal standard by which the Court  
17 can determine that the interests of creditors are being  
18 safeguarded whenever a municipal debtor invokes the  
19 provisions of Chapter 9 that are outside Section 904 I think  
20 is going to be critical and precedent setting, not only in  
21 this case but also in the other cases, and I think that it is  
22 inconsistent for the city, I guess, in my mind, your Honor,  
23 to say that this evidence isn't relevant or that you're not  
24 permitted to consider it when it dominates their motion and  
25 where they are asserting that they have exercised good

1 business judgment and that what they're going to do is in the  
2 best interest of creditors and is necessary to enhance the  
3 value of the estate and so forth, the other elements that  
4 you'll consider under Section 364. That is why we want to  
5 obtain that discovery, and we want to test the proposition  
6 that the city is advancing that this is a good way to spend  
7 the money and, by the way, so important that it has to be  
8 done now outside of the plan context at a time where the city  
9 doesn't have some sort of cash flow emergency. It's my  
10 understanding that the city's cash coffers have actually  
11 increased substantially during the bankruptcy in part because  
12 it isn't -- it is not paying bond debt such as the debt held  
13 by my client in part, so this isn't a situation where the  
14 city is coming to you and saying we need \$5 million to get us  
15 through the case or to pay professionals or to literally pay  
16 the police officers. The city has more cash today than it  
17 did when it started the cases. It is about a novel and  
18 distinct concept, in our view, novel in the history of  
19 Chapter 9, which is that during the pendency of the case, you  
20 can use the Bankruptcy Code to revitalize the city and to  
21 allow for a renaissance, which is the word from the  
22 declaration and from the motion. And whether you can do that  
23 outside the plan context and whether you can actually  
24 subordinate creditor recoveries to the notion of  
25 revitalization is, we believe, a threshold issue of critical

1 importance to the cases, and that's why we are urging the  
2 Court to allow us to take discovery, to allow for a fully  
3 developed record before you for whatever decision that you'll  
4 make on this subject when we try it.

5 THE COURT: What does this discovery entail  
6 specifically?

7 MR. HACKNEY: What I would think it would entail  
8 is -- I understand that we haven't proffered requests yet,  
9 but I've already mentioned to counsel for the city that I  
10 understand we'll have to put some thought into formulating it  
11 because we don't want every piece of paper that relates to  
12 the fire department or the police department or to blight,  
13 and it's likely burdensome for the city to go collect all of  
14 that information. What I was thinking that we would want  
15 were two principal types of information. The first type of  
16 information would be information that relates to assessments  
17 of how the City of Detroit can improve itself. There have  
18 been consultants obviously in this case who have been doing  
19 this type of work. There have also been other consultants,  
20 it's my understanding, in the history of the City of Detroit  
21 who have looked at some of these questions, and the types of  
22 documents or reports, whether it's from a consultant or  
23 whether it's something internal at the Detroit  
24 Fire Department itself that says here are our needs, here are  
25 the most important things to us that would most allow us to

1 achieve our mission, here's the anticipated costs, those  
2 types of analytical documents I think would be of extreme  
3 importance to creditors so that they can make an assessment  
4 of whether or not the city is exercising its judgment in a  
5 way that's most appropriate or that is most efficient, and  
6 the second type of document that I could see would be  
7 documents that Mr. Orr himself considered as the decider  
8 behind the loan as he's looking out at the city he's  
9 administering and trying to decide how much money do I need  
10 and what pacing and where will I put it and why, documents  
11 that he considered that show how he selected the priorities  
12 that he selected and documents that show what perceived  
13 impact his decisions will have on the creditors in terms of  
14 their recoveries to the extent these documents exist. Those  
15 are the types of documents I was thinking of when we broadly  
16 described the concept of discovery into the uses and needs of  
17 the quality of life note.

18 A third category of documents would be additional  
19 specificity around the deployment of the capital in terms of  
20 how it will be spent, the specific uses.

21 There are also some depositions that we had proposed  
22 in addition to the two affiants, and the city, I think, is of  
23 the view that it may object to some of those depositions.  
24 There were four that we had put forward, a Barclays  
25 deposition that relates to the negotiation of the DIP itself;



24 MR. HAMILTON: Good afternoon, your Honor. Robert  
25 Hamilton of Jones Day on behalf of the City of Detroit. When

1 we received on October 23rd Syncora's motion for authority to  
2 take discovery under Rule 2004, while we thought the  
3 procedure was incorrect, we understood that discovery was  
4 inevitable and going to occur with respect to our at that  
5 time anticipated motion to obtain approval for the post-  
6 petition financing from Barclays, and we immediately began  
7 the process of collecting and reviewing documents for  
8 eventual production to Barclays -- I mean to Syncora and  
9 others who may decide to object to our motion for approval of  
10 the financing facility.

11 We have collected and reviewed documents with  
12 respect to how much financing -- external financing the city  
13 will need to fund the assumption of the forbearance agreement  
14 if this Court were to approve that assumption in a separate  
15 hearing as well as how much external financing would be  
16 needed to start the funding of the restructuring initiatives  
17 that were the subject of the July 14th proposal to creditors  
18 and that was the subject of extensive testimony during the  
19 eligibility trial that your Honor oversaw over the last few  
20 weeks.

21 We've also collected documents regarding the  
22 solicitation process for potential participants in the post-  
23 petition financing facilities as well as the myriad of  
24 proposals that we received from various potential lenders and  
25 their terms and documents regarding the exercise of the

1 city's business judgment in selecting the Barclays proposal  
2 as the best one for the city. As a result of that process,  
3 we have collected and are prepared to produce tomorrow or  
4 Monday over 5,000 pages of documents on each one of those  
5 topics to those parties who indicate that they want to take  
6 that discovery and, with respect to some of the documents,  
7 agree to a protective -- or a confidentiality agreement to  
8 maintain the confidentiality of some of the documents that  
9 we're submitting.

10 We have also offered to Syncora to make our  
11 witnesses, our two declarants, available for deposition, Mr.  
12 Doak, who you heard from today, on Friday, November 22nd, in  
13 New York, and on Monday, November 25th, Mr. Moore in Detroit.  
14 The city consents to the discovery that I've just outlined  
15 the production of all these documents on the need for  
16 external financing, the process for obtaining that financing,  
17 and the selection of Barclays. We consent to the deposition  
18 of those two declarants.

19 Syncora is asking for leave to take discovery on  
20 other subjects that go substantially beyond the scope of what  
21 we consented to, we believe on subjects that threaten to  
22 impose substantial economic and logistical burdens on the  
23 city on topics that we believe are not what this Court must  
24 adjudicate when it hears and determines our motion for  
25 approval of the post-petition financing motion. Those

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The more difficult argument and the more difficult category is what counsel spent most of his time in his argument on, and that is the request for discovery on our proposed use of the quality of life -- the proceeds of the quality of life bonds. The devil in this request is substantial. While he indicates that they want to take just limited document discovery, just assessments that the city may have developed both at the macro level and at individual department levels, the fire department, the police department, and how much money they think they need for what

Essentially, I think what counsel is suggesting is that Section 364 constitutes an effective repeal of Section 904 in a Chapter 9 case where the Bankruptcy Court does not have authority or jurisdiction to interfere with a municipality's governmental decisionmaking and its decisions on how to use its property and revenue unless the municipality decides they have to borrow some money, and if the municipality decides it has to borrow some money, then the Bankruptcy Court, notwithstanding 904, can sit in ultimate judgment and second-guess every single spending decision that the city makes on how much money to spend on fire, how much money to spend on police, how much money to spend on lighting, how much spending -- money to spend on

1 roads, versus creditor recoveries. And, in essence, they  
2 would turn the 364 --

3 THE COURT: Don't forget pensions.

4 MR. HAMILTON: Very important, pensions, maybe not  
5 sacrosanct, but very important. And the point would be that  
6 instead of the Chapter 9 plan of adjustment process working  
7 those things out, they want to turn the 364 hearing into some  
8 macro hearing that decides how all the money that the City of  
9 Detroit should spend for the next ten years, how it should be  
10 spent, what dollars should go to creditor recoveries, what  
11 dollars should go to fire improvement, what dollars should go  
12 to police improvement, all because we have to borrow some  
13 money in order to fund some of these initiatives. We do not  
14 think that is a proper construction of either 904 or 364. We  
15 believe that when you hear the 364 motion, we have to  
16 demonstrate that we exercise sound business judgment in  
17 determining that we needed to borrow money in order to meet  
18 our cash needs. We will also have to demonstrate that we --  
19 in order to borrow that money under 364(c)(2), we had to give  
20 super administrative priority status and liens because  
21 general unsecured credit was not available. That does not  
22 mean that this Court will sit in review of the city's  
23 business judgment on the underlying money that is needed.  
24 You do sit in judgment on whether or not forbearance  
25 agreements should be approved, but that's on a separate

1 motion under 365 and a 9019 motion. And if you decide that  
2 that forbearance agreement should be approved, then we know  
3 we need \$210 million. Then, in connection with the 364  
4 motion, you will hear and adjudicate our business judgment as  
5 to whether or not we needed to borrow the money to pay that  
6 \$210 million and whether or not the terms on which we want to  
7 borrow that money are reasonable and in everybody's best  
8 interest. That is your call.

9 Similarly, by the same token, with respect to the  
10 restructuring initiatives, the city has exercised its  
11 governmental and political judgment as to how much money it  
12 should invest in its restructuring initiatives over the next  
13 ten years. You do not sit in judgment and review the city's  
14 exercise of its governmental and political decision-making in  
15 that regard. That's up to the city to figure out how to do  
16 with the mayor, with the emergency manager, and with all the  
17 constituents. We have already presented an extensive  
18 evidentiary record on how those calculations were made, what  
19 the restructuring initiatives are, and how much they will  
20 cost over the next ten years. And we lay that out in our  
21 motion just like we lay out all the details of the  
22 forbearance agreement, but in connection to whether or not  
23 you're going to approve the financing arrangement, what you  
24 sit in judgment on is not our decision to spend \$1.25 billion  
25 over the next ten years on those restructuring initiatives



1 because that's a governmental political decision that only  
2 the City of Detroit has the authority to make. What you sit  
3 in judgment on is our business judgment that we need to  
4 borrow some money to start paying for those initiatives and  
5 the terms on which we want to borrow that money are  
6 reasonable. That's what you sit in judgment on, and we are  
7 going to produce the documents that are relevant to that  
8 inquiry, but it is not appropriate to turn the 364(c) hearing  
9 into some mega trial that kind of makes moot the whole plan  
10 of adjustment in which the parties ask you to decide what's  
11 an appropriate use of loan proceeds and what's not. Should  
12 we use the loan proceeds to pay creditor recoveries, or  
13 should we use it to pay pensions, should we pay it to use --  
14 to pay for OPEB, or should we use it to pay for lighting?  
15 That's not what this hearing is about, and I think it's  
16 improper for them to try and seek discovery on that.

17 We are willing to make Mr. Moore and E&Y available  
18 for deposition on the fact that we need to borrow money to  
19 start paying -- to start funding the initiatives, the  
20 restructuring initiatives, but we think it is improper for  
21 them to take discovery on the underlying decision-making, the  
22 political and governmental decision-making that the City of  
23 Detroit has undertaken in deciding what restructuring  
24 initiatives they're going to undertake and when over the next  
25 ten years and how much they're going to cost. That's not

1 appropriate for this motion.

2 THE COURT: Thank you, sir.

3 MS. CONNOR COHEN: Your Honor, may I also be heard  
4 in support of the motion?

5 THE COURT: Yes, ma'am.

6 MS. CONNOR COHEN: Carol Connor Cohen, your Honor,  
7 on behalf of Ambac Assurance Corporation. Your Honor --

8 THE COURT: But not to repeat anything.

9 MS. CONNOR COHEN: I'm sorry.

10 THE COURT: But not to repeat anything.

11 MS. CONNOR COHEN: I will not repeat anything. I  
12 want to start with, though, talking about what the test is  
13 under 364 because quite clearly the city has moved to have  
14 your Honor make a ruling under 364(c) in this bond financing.  
15 The Court will have to look at whether the debtors exercise  
16 reasonable business judgment, whether --

17 THE COURT: On what?

18 MS. CONNOR COHEN: On -- I'm going to -- would you  
19 just let me finish, and I'll get back to that? I want to  
20 come back to that.

21 THE COURT: You're asking me not to ask you any  
22 questions?

23	MS. CONNOR COHEN: No.
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24 THE COURT: I didn't think so.

25 MS. CONNOR COHEN: No, but actually there's a point

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1 | I want to make --
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2 THE COURT: Okay.

3 MS. CONNOR COHEN: -- here that --

4 THE COURT: I'll let you work into it. That's fine.

5 MS. CONNOR COHEN: -- the Court has to exercise  
6 reasonable business judgment, has to evaluate whether it's in  
7 the best interest of creditors and the estate, has to look at  
8 alternative financing that might have been available, whether  
9 there are any better bids and all that kind of stuff -- we've  
10 talked about that -- whether it's necessary, essential, and  
11 appropriate to preserve the estate and continue operations,  
12 whether the terms are fair, reasonable, and adequate, whether  
13 it was negotiated in good faith and at arm's length. Now,  
14 some of those criteria are the same as in a Chapter 11, and  
15 some of those criteria the debtor has said they're happy to  
16 give us discovery on. But there's two or three of these that  
17 really have never been applied before on a Chapter 9, and  
18 that's exactly my point, the reasonable business judgment and  
19 the best interest of creditors and the estate and whether  
20 it's necessary, essential, and appropriate to preserve the  
21 estate and continue operations. Those have never been  
22 applied before in a Chapter 9, and part of what the Court  
23 will have to do in deciding the motion before the Court will  
24 be to decide what the proper criteria is, in fact. I don't  
25 believe that's what we're here for today because there is

1 going to be extensive briefing, I'm sure, on those questions,  
2 and, you know, we will --

3 THE COURT: Well, but some judgment about that is  
4 necessary to control or decide the dispute about discovery.

5 MS. CONNOR COHEN: Of course it is, and what we will  
6 point to in discussing that issue, for example, is the  
7 legislative history that was -- when 364 was first  
8 incorporated into what was then the version of Chapter 9, and  
9 at that time Congress said the reason they were doing it, the  
10 reason they were adding this ability in for a municipality  
11 was so that the municipality could maintain essential city  
12 services directed to public safety and public health during  
13 the reorganization proceeding, kind of a narrow purpose  
14 because it was very controversial to add this provision into  
15 Chapter 9.

16 Now, the question is going to become -- and we  
17 don't -- this isn't a question for today again, but the  
18 question is going to become at what level is the city  
19 permitted to spend at the creditors' expense and still be  
20 able to confirm a plan because it is pretty well settled --  
21 there's tons of cases out there that when it comes time to  
22 confirming a plan of adjustment, that the best interest of  
23 creditors test does limit the city's ability to spend lots of  
24 money on improving and glossing the current situation as  
25 opposed to paying off creditors, that there's a limit to how

1 much money the city can expend at the expense of creditors.  
2 We believe that same criteria should apply on the best  
3 interest of creditors position here.

4 THE COURT: Fixing the lights in the city is  
5 glossing the city?

6 MS. CONNOR COHEN: No. And we're not talking about  
7 the Lighting Authority motion right now anyway, but you're  
8 right.

9 THE COURT: All right. Fair enough. I'll change  
10 the question.

11 MS. CONNOR COHEN: To ask --

12 THE COURT: Getting adequate police and fire is  
13 glossing the city?

14 MS. CONNOR COHEN: Having adequate police and fire  
15 is not putting a gloss, absolutely not. And the legislative  
16 history suggests that's exactly why this provision was added  
17 to Chapter 9, but how and whether you're doing it in the most  
18 efficient manner or at the expense of repayment of creditors  
19 is something that's in this Court's purview under this test.

20 Now, we keep hearing 904, 904, 904. 904 is not an  
21 absolute. 904 says quite clearly that the debtor can consent  
22 to the Court's involvement, interference, as the statute  
23 says. Here the debtor has come to the Court. They could  
24 have gone off and spent their money however they wanted.  
25 They could have borrowed money if -- and spent it how they

1 wanted, but they came to your Honor and asked for an order,  
2 and the reason they're coming to your Honor and asking for an  
3 order is because --

4 THE COURT: They came to the Court for an order but  
5 only to approve the necessity of the borrowing, the necessity  
6 of the priority and the senior liens, and to establish the  
7 reasonableness of the terms.

8 MS. CONNOR COHEN: But --

9 THE COURT: What suggests there's any consent beyond  
10 that?

11 MS. CONNOR COHEN: Well, once you do that, when they  
12 come to your Honor and asked to be able to give Barclays this  
13 superpriority treatment and the like, then that has to be  
14 considered consent to having the criteria under 364(c) apply,  
15 which includes looking at the best interest of creditors and  
16 whether they are not --

17 THE COURT: Okay. Can you walk me through the baby  
18 steps as to why that follows because I don't exactly see it?

19 MS. CONNOR COHEN: Well, simply coming to the Court  
20 in the first instance has in other situations effectively  
21 been treated as consent. All right. But they didn't have to  
22 come to your Honor.

23 THE COURT: I'm not sure the proponents of Stern  
24 versus Marshall would a hundred percent agree with you on  
25 that.

1 MS. CONNOR COHEN: Well, I don't -- okay. I'm going  
2 to let that one pass, but --

3 THE COURT: Well, no. It's an important point,  
4 which is the mere fact that a party comes to court can mean  
5 consent to some things, but you have to be very careful in  
6 measuring what the consent is.

7 MS. CONNOR COHEN: All right. I'll take that as a  
8 given, but what the -- again, what the --

9 THE COURT: Why I'm asking --

10 MS. CONNOR COHEN: What the debtors --

11 THE COURT: Why does this motion constitute consent  
12 for this Court to approve, for example, how the city will  
13 spend \$350 million?

14 MS. CONNOR COHEN: Because they're asking your Honor  
15 to give them -- to give Barclays, this new lender who's going  
16 to come in and layer on \$350 million worth of new debt --

17 THE COURT: Um-hmm.

18 MS. CONNOR COHEN: -- over and above most of the  
19 other creditors in this case --

20 THE COURT: Um-hmm.

21 MS. CONNOR COHEN: -- they're asking them to have  
22 that superpriority status, to become a superpriority creditor  
23 of the city, and part of the criteria for deciding whether  
24 that's appropriate is to look at the best interest of  
25 creditors, a test we believe has to be interpreted the same

1 way as the best interest of creditors test in confirming a  
2 plan of adjustment, which, again, looks at a balance of the  
3 extent to which the city can spend at the expense of the  
4 creditors, so that does require -- now, the litany of  
5 horrors we got about the kind of trial, we don't think  
6 that's what you were looking at.

7 THE COURT: Is there a 943 case that says that?

8 MS. CONNOR COHEN: I'm not aware of a 943 case, no,  
9 but when -- what we're talking --

10 THE COURT: You know what I'm asking. I'm asking in  
11 defining best interest of creditors in plan confirmation, is  
12 there a case that gives the -- that says the Court has that  
13 broad authority?

14 MS. CONNOR COHEN: There actually was case law cited  
15 in Syncora's objection to the Public Lighting Authority  
16 motion that we joined in that says it's --

17 THE COURT: I should look there?

18 MS. CONNOR COHEN: Those cases say exactly that.

19 THE COURT: All right. I'll look there. Thank you.  
20 That's all right. If it's there, you don't need to pull it  
21 out again.

22 MS. CONNOR COHEN: Sorry.

23 THE COURT: That's all right.

24 MS. CONNOR COHEN: I don't retain case names.

25 THE COURT: Right.



1 MS. CONNOR COHEN: And I lost what I was saying.

2 THE COURT: Oh, I'm sorry.

3 MS. CONNOR COHEN: No. It's not your fault.

4 THE COURT: Okay. I won't take any then.

5 MS. CONNOR COHEN: Because that is a factor that has  
6 to be taken into account at plan time in that text -- in that  
7 context, then we think that's something that has to be taken  
8 into account also in applying 364 because it also  
9 incorporates a best interest of creditors component in the  
10 factors, at least according to the case law, and that -- by  
11 invoking the Court's jurisdiction to ask for that order, we  
12 believe they have consented to having the Court look at the  
13 things that have to be looked at.

14 Oh, I know what I was saying. I was saying that the  
15 hearing that we're looking for doesn't envision, you know, a  
16 lengthy exposition of all of the operational details of all  
17 of these various departments and so forth and so on but  
18 rather a testimony about what they're going to spend it on,  
19 why they need it, why they need those things, and why it has  
20 to cost what they think they're asking for, and once your  
21 Honor hears the testimony, then you decide does it meet this  
22 criteria or not. It's not saying this expenditure is okay  
23 and this expenditure isn't.

24 THE COURT: Where in this process do the citizens of  
25 Detroit get to be heard?



1 MS. CONNOR COHEN: Well, it's a judicial process to  
2 the extent that your Honor has to apply the standards that  
3 are in the statute and in the case law interpreting the  
4 statute for providing Barclays with the superpriority status.

5 THE COURT: Suppose the creditors' interests are  
6 different from the citizens' interests? What do I do then?

7 MS. CONNOR COHEN: Your Honor applies the statute,  
8 the statutory --

9 THE COURT: Creditors win over the --

10 MS. CONNOR COHEN: -- standard, which says that you  
11 have to balance -- obviously the -- we don't -- none of us  
12 would disagree that the city is entitled to and should spend  
13 those amounts necessary to provide essential service to  
14 provide public safety and health but doing so in a way and at  
15 a cost that is reasonable and that doesn't do so at the  
16 expense of the creditors. Thank you, your Honor.

17 THE COURT: All right.

18 MR. HACKNEY: Your Honor, can I reply to Mr.  
19 Hamilton?

20 THE COURT: You can, but let me see if there are any  
21 other objecting parties --

22 MR. HACKNEY: Absolutely.

23 THE COURT: -- who want to be heard, and then I'll  
24 give you a chance. Did you want to be heard, Mr. Gordon?

25 MR. GORDON: Thank you, your Honor. Robert Gordon

1 of Clark Hill on behalf of the Detroit Retirement Systems.  
2 Thank you, your Honor. In some respects, your Honor, I feel  
3 like I'm still trying to catch up from last week's trial to  
4 this issue, and I think it highlights what I'm seeing from  
5 over there as a chicken and egg and chicken again issue right  
6 now, which is it sounds like we're arguing objections that --  
7 legal issues that may be implicated by the motion that was  
8 filed for the DIP financing, which is supposed to be heard  
9 later, which hasn't been fully briefed yet, which may  
10 determine what the total contours are of what's fair to ask  
11 for in discovery. We're arguing today to figure out what we  
12 can ask for in discovery, and I'm concerned about that  
13 because we haven't had a chance to fully brief this.  
14 There's significant legal issues that are being discussed  
15 here, but I don't think all of us have a chance to brief that  
16 just yet, so I'm concerned about that. So I'm not sure  
17 whether --

18 THE COURT: Well, I don't know what to do about  
19 that.

20 MR. GORDON: Yes.

21 THE COURT: It is a concern, but the fact is that  
22 Syncora filed this motion, and the choice was deal with it  
23 now or deal with it later, and the reason why I chose now is  
24 because the city says it's got to get going on this loan.

25 MR. GORDON: Well, there seem to be a couple of

1 options here. One, I'm just trying to think this out --  
2 think this through with you before we're --

3 THE COURT: Um-hmm.

4 MR. GORDON: -- prejudiced in some way because I  
5 would like to be able to brief this if we're really going to  
6 go down this path today. The discovery could be held in  
7 abeyance while we file objections to the DIP financing and  
8 claim that there's all sorts of reasonable business judgment  
9 issues that the Court should be probing, and the Court could  
10 then rule upon whether those are fair game or not subject to  
11 discovery, but then we'll be into mid-December, and then  
12 we'll be starting discovery. The city says that's not fast  
13 enough for us. Everything has to be immediately because our  
14 hair is on fire and everything else, and, you know,  
15 everything has to be done like yesterday for reasons I'm not  
16 exactly sure since they're accumulating cash in the meantime  
17 and they're still paying payroll and so forth. That's one  
18 option. Doesn't seem real efficient, but that's one option.  
19 The other option --

20 THE COURT: Well, hold on.

21 MR. GORDON: Yes, sir.

22 THE COURT: I'm sure the city is as concerned as you  
23 are about the fact that the retirement contributions aren't  
24 being made.

25 MR. GORDON: I hope they're concerned about it. I'm

1 not sure, but I hope so. I'm sorry, your Honor. I'm not  
2 sure if I'm following --

3 THE COURT: You missed my point.

4 MR. GORDON: I missed your point. I'm sorry.

5 THE COURT: Well, your point was there's no urgency  
6 here.

7 MR. GORDON: Oh, I didn't say no urgency. I'm just  
8 trying to think of what's prudent.

9 THE COURT: Well, your point was that there was no  
10 urgency here, that we can wait till January.

11 MR. GORDON: Not necessarily, your Honor. The other  
12 option is that we allow this discovery because it's not as --  
13 certainly not as broad as what we just engaged in in the last  
14 45 days in connection with eligibility, that we allow this  
15 discovery, and if some of it turns out to, in your mind, not  
16 be relevant, then I mean we've certainly incurred an expense.  
17 There's no doubt about that. But if the urgency is more  
18 important, then so be it, but I don't think we should be  
19 precluded from at least taking the discovery and being fully  
20 prepared to point out things. I think we all actually were  
21 surprised at some of the things that came out in discovery  
22 relative to the trial last week that -- anyway, I won't go  
23 into that, but I do -- no problem. Sorry. So that's another  
24 option is I mean, you know, if urgency is that important,  
25 then the discovery seems to be fairly narrowly tailored. We



1 THE COURT: Well, no.

2 MR. GORDON: I don't know how you -- I don't know --

3 THE COURT: I think the argument is you reconcile  
4 364(c) with 904.

5 MR. GORDON: And how do you do that? I mean I  
6 didn't hear anything here that could parse that and -- well  
7 enough to say that we shouldn't be talking about what is  
8 reasonable business judgment in terms of what you're going to  
9 use this for if you're going to incumber unincumbered assets  
10 that could otherwise be used in various ways and which are  
11 not being proposed -- these initiatives are not being  
12 proposed in the context of an overall Chapter 9 plan.  
13 They're saying they need to commence these things, but  
14 they're not doing it in the context of a Chapter 9 plan.  
15 They're doing it outside of a plan. I think there are  
16 serious implications there.

17 THE COURT: So you think, just to summarize, that  
18 the city should go with an understaffed police department, an  
19 understaffed fire department, 40 percent of lights lit, I'm  
20 not sure how many tens of thousands of abandoned properties,  
21 until a plan is confirmed?

22 MR. GORDON: No, your Honor, but I'm not -- I am not  
23 sure that the \$150 million portion of the DIP loan has been  
24 clearly identified as to what it will go for, so I think that  
25 there are fair questions to be asked about that, but if it is



1 going to provide essential services, that would be a  
2 different story. And as to the \$200 million portion of it,  
3 of course, all subject to the arguments we've made -- that  
4 all the parties have made regarding whether the swap  
5 participants are even entitled to it, there needs to be some  
6 analysis of whether if that part goes away, if the Court  
7 determines that the swap participants are not secured  
8 creditors, is the 150 million still there? How is that  
9 affected? I don't know that we've fully analyzed that yet.

10 THE COURT: All right. Thank you.

11 MR. GORDON: Thank you, your Honor.

12 THE COURT: Before I get back to you, I want to ask  
13 a question of the city because I want to give you the last  
14 word. Sir, at the lectern, please.

15 MR. HAMILTON: Yes, sir.

16 THE COURT: I didn't quite hear your response on the  
17 request for discovery regarding compliance with PA 436.

18 MR. HAMILTON: We have no -- we have no problem with  
19 that. They wanted to take a deposition of a City Council  
20 member. We took no position on that. We don't represent the  
21 City Council. We would appear at the deposition if it  
22 happens.

23 THE COURT: All right. Thank you. Sir.

24 MR. HACKNEY: Thank you, your Honor. I will be  
25 brief, but the stakes are very high, and I think that the

1 legal position that the city is taking is breathtaking here  
2 because you heard Mr. Hamilton say that when they come to you  
3 on a 364 motion and they ask you to work the controls of the  
4 Bankruptcy Code to their advantage, should you deign to  
5 ask -- to probe behind what they're using the money for, why  
6 they believe they need it and assess whether this borrowing  
7 is in the best interest of creditors, apply some of those  
8 different elements you heard both counsel and I talk about,  
9 that if you're to do that, now you're sitting as a super  
10 tribunal almost how dare you interfere with our  
11 administration. You are now acting as a super tribunal when  
12 there's no question that if they did these very plan-like  
13 steps, paying \$220 million to a creditor, investing in the  
14 city, revitalizing the city and pushing down on the creditor  
15 stack to do so, if they did that in the context of a plan,  
16 there is no question that the Court would be within its  
17 rights to make all of those assessments, whether it's fair  
18 and equitable, whether it's in the best interest of  
19 creditors, those precise elements that are designed to  
20 protect creditors and make sure that the plan is fair, that  
21 it does fairly adjust the debts. The thesis here is, well,  
22 why don't we just pull it forward because if we can pull it  
23 forward out of the plan context, we can engage in a number of  
24 these key set pieces with the Court where their position is  
25 that they will come in and say, "In my judgment, it's

1 necessary, and you must defer to my judgment." You're given  
2 no opportunity to assess, and you could give away the city,  
3 so to speak, in the process of improving itself because you  
4 could -- Detroit's challenges are well-known, and I'm  
5 sympathetic to and sensitive to your questions. I don't mean  
6 to be callous. I understand that there are issues with the  
7 lights, with 911 response times, and I understand that there  
8 are real people out there today that are living with these  
9 challenges, and I'm not being callous, but I do want to say  
10 this. They've been living with these challenges for a very  
11 long time, and while it is important that --

12 THE COURT: This argument does not impress me,  
13 counsel. Don't go there.

14 MR. HACKNEY: But while it's important, it is  
15 something that must be fairly balanced with the other aspects  
16 of the city's --

17 THE COURT: That's a fair point, but the fact that  
18 they've been living with it for a long time --

19 MR. HACKNEY: Agree. Well, and --

20 THE COURT: -- is no justification for imposing it  
21 upon them for another day.

22 MR. HACKNEY: I'm not trying to say that we should  
23 make them wait for no reason at all. I am saying that there  
24 is a good reason to approach this with both the benefit of a  
25 fulsome record and with caution because, your Honor, even as

24 I'd like to finish with one point. I want to thank  
25 you for your patience. There's one thing that doesn't make

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1           THE COURT: It's a big number, but it pales in  
2 comparison to the numbers I heard the city needs for its  
3 revitalization program over -- I think it was ten years.

4           MR. HACKNEY: I think that in some respects, your  
5 Honor, the whole case is about that word "need," and I think  
6 it's a hard question because I think that this is something  
7 that's --

8           THE COURT: Isn't "hard" just another word for  
9 political?

10          MR. HACKNEY: No. I think in this case it's  
11 emphatically going -- it is certainly also a political  
12 question that people wrestle with, that certainly the city  
13 wrestled with before bankruptcy under the constraints that it  
14 had to operate under. I think it is -- no matter how much we  
15 struggle with the difficulty, it is a legal question, though,  
16 for you because -- because necessity is something that  
17 municipalities struggle with everywhere outside of  
18 bankruptcy, when they come to bankruptcy and they now want to  
19 confirm a plan and get out, they have to prove to you that  
20 the steps that they propose to take, the recoveries that they  
21 propose to offer are fair and equitable and are in the best  
22 interest of creditors. In the case of the City of Detroit  
23 that has these well-documented challenges -- and I won't  
24 shirk from saying that they are significant challenges -- at  
25 some point doesn't Kevyn Orr just come in and say, "Why would

1 I ever give creditors a dollar? I mean the needs here are  
2 substantial, and I intend to invest not a billion" --

3 THE COURT: A lot of people think that's what he  
4 already said.

5 MR. HACKNEY: I guess I would say he's come  
6 relatively close to it, but I'll finish with one point, which  
7 is you can see there's a logical way to back into the fact  
8 that the Court must be as vigilant, we believe, in the  
9 interregnum period between eligibility and closing as it is  
10 in confirmation. And the logical point is that if you put  
11 the plan together that said we are going to revitalize the  
12 city, improve services, speed up police officer response  
13 time, protect our firemen, remediate blight, build parks, all  
14 sorts of different types of things, and give the creditors  
15 nothing or very little, pretend that the plan said that --  
16 some people feel that the plan does say that today, but  
17 pretend in this hypothetical the plan said that and it didn't  
18 marshal any creditor support, it wouldn't be a confirmable  
19 plan that would allow the city to exit, so you know that in  
20 the backdrop of all of this, the need to have at least some  
21 creditor support -- and the history of Chapter 9 indicates --

22 THE COURT: Well, it's way premature to come to the  
23 conclusion about what plan is confirmable and what isn't.

24 MR. HACKNEY: This motion --

25 THE COURT: There are provisions for cramdown --

1 MR. HACKNEY: There are.

2 THE COURT: -- in Chapter 9.

3 MR. HACKNEY: There are, but those provisions  
4 still --

5 THE COURT: A plan can be confirmed with no creditor  
6 support.

7 MR. HACKNEY: Well, at least an impaired assenting  
8 class I would expect even in cramdown, but understood. You  
9 could have a small minority, but it would still have to  
10 satisfy all those factors of what's fair and equitable,  
11 what's in the best interest of creditors.

12 THE COURT: True.

13 MR. HACKNEY: Those never go away, and I think  
14 that's the difference between when you come to a bankruptcy  
15 judge in a Bankruptcy Court and start asking for these unique  
16 aspects of the Code is that that is the perspective, and this  
17 is one of the things we intend to brief for you in our  
18 objection because I do want to -- it is absolutely  
19 complicated and I believe reasonably a first impression.  
20 We've been --

21 THE COURT: All right. I'm inventing a process here  
22 that I think will at least go some good measure of the way  
23 toward accommodating everyone's interest here because I think  
24 there -- I think there is merit in the concerns that you have  
25 raised and that Mr. Gordon have raised about process here, so



1 here's the best I can come up with to try to accommodate  
2 everyone's interest here. The first is between now and when  
3 we start the hearing to limit discovery in the ways that the  
4 city has proposed or, in the case of PA 436, not opposed, and  
5 then this will give you then an opportunity to brief more  
6 fully than we have in connection with today's hearing the  
7 issue of what is the appropriate scope of the Court's review  
8 of this motion under Section 364(c). And then in the context  
9 of that hearing, which the Court will take so much evidence  
10 as the city thinks is relevant to the motion, according to  
11 its view of the scope of the Court's review, the Court will  
12 then decide whether, based on its determination of the scope,  
13 that the record is complete or to provide for further  
14 discovery on a more expanded scope of review, so I know it's  
15 a little bit more cumbersome and complex, but I think there  
16 is merit in trying to make a determination of the scope of  
17 review in a more fulsome way than this discovery motion has  
18 allowed us to do, so that will be my order at this point in  
19 time. I will try to prepare an order that perhaps more  
20 articulately sets forth what I'm trying to do here than I  
21 have been able to on the record here.

22 MS. CONNOR COHEN: Thank you, your Honor.

23 MR. NEAL: Your Honor, just -- good afternoon again.  
24 Guy Neal. Just a question on the objection deadline. I know  
25 there's been talk potentially of having that date moved. I

1 | believe it's --

2 THE COURT: What is the deadline now?

3 MR. NEAL: I believe it's on the 22nd, but I thought  
4 that it might be moved to the 27th. I'm just not sure where  
5 it stands today.

6 MR. ERENS: Your Honor, the notice that the debtor  
7 sent out had set the 21st as the objection deadline. We've  
8 already talked to Syncora because of the need to accommodate  
9 discovery that we would move that objection deadline to the  
10 27th. The debtor then would reply on the 4th consistent with  
11 the order your Honor issued in connection with the 10th, the  
12 hearing on the 10th, and then we'd have the hearing on the  
13 10th.

14 THE COURT: All right. So if that's your  
15 stipulation, you may submit that, but you'll engage in  
16 discovery in the meantime. Is that the idea?

17 MR. HACKNEY: It is.

18 THE COURT: All right.

19 MR. HACKNEY: Your Honor, can I ask one clarifying  
20 fact?

21	THE COURT: Sure.
----	------------------

22 MR. HACKNEY: I promise not to hector you to death  
23 with questions, but the one --

24 THE COURT: Thank you.

25 MR. HACKNEY: The one thing that I do want to

1 understand because I don't want to violate this order, which  
2 is Mr. Moore's deposition, because -- can I --

3 THE COURT: The city has offered it up. You take --  
4 you ask him whatever questions you want to ask him.

5 MR. HACKNEY: Okay. That's the best way because  
6 then we don't have to do them twice or whatever. I just  
7 wanted to clarify that. Thank you.

8 MR. ERENS: Also, I should make clear, your Honor,  
9 we would try, if it was okay with your Honor, to have the  
10 objection deadline moved to the 27th only for parties who  
11 felt they needed to participate in discovery. If parties did  
12 not think they needed to participate in discovery, we'd like  
13 to get those objections so that we can start reviewing them.  
14 The city will not have a long period of reply.

15 THE COURT: Can you readily identify those parties  
16 or are we going to have a dispute about which parties and  
17 which category?

18 MR. ERENS: We will certainly try, so we'll do our  
19 best.

20 THE COURT: All right. Well, I'll trust you to try  
21 to work it out. If there are issues, you can get me on the  
22 telephone.

23 MR. ERENS: Okay. Thank you.

24 (Hearing concluded at 3:40 p.m.)

## INDEX

WITNESSES:

None

EXHIBITS:

None

I certify that the foregoing is a correct transcript from the sound recording of the proceedings in the above-entitled matter.

/s/ Lois Garrett

November 19, 2013

\_\_\_\_\_  
Lois Garrett

**Exhibit E**

**Moody's Report**

## SPECIAL COMMENT

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## Detroit: DIPing its Toe into a Corporate Bankruptcy Tool

On October 11, 2013 the City of Detroit's Emergency Manager (EM) Kevyn Orr issued an order, approving a Debtor-In-Possession (DIP) financing proposal. DIP financings are commonly used in the corporate sector to inject liquidity into a bankrupt entity, with the objective of paving the way for eventual recovery. In the municipal sector, however, DIP financings are unprecedented. Detroit is likely the first local government to propose this type of post-petition financing structure as it continues to navigate the Chapter 9 bankruptcy process, while balancing the competing interests of operating an insolvent city and negotiating with a variety of creditors.

The proposed Detroit DIP financing draws from the corporate playbook with respect to most structural terms, but it differs from a typical private-sector DIP financing in important ways. Perhaps most significant is the stated use of proceeds, which highlights the difference of Detroit's insolvency, and options for recovery, from the typical bankrupt corporate. Ultimately, because of the lack of precedent in the municipal market and the key differences in Detroit's proposal, it is too early to assess the impact of the proposal on the city's finances and existing bondholders.

### Detroit's DIP financing proposal differs substantially from its corporate predecessors

The \$350 million post petition financing proposed by Detroit comprises two notes that would be repaid over a 30 month maximum final maturity period, at a rate of one month LIBOR plus 250 basis point spread.

- » The "Swap Termination Note", which is estimated to total \$230 million, will be used to pay off outstanding swaps at approximately 75% of termination value. The pledged revenues comprise a super-priority lien on income tax revenues, up to \$4 million per month in the event of a default, along with the proceeds of a sale or lease of a city asset in excess of \$10 million.
- » The "Quality of Life Note", generating the remaining \$120 million of proceeds, will provide working capital for the city. The note's pledged revenues comprise a super-priority lien on casino gaming taxes, as well as a second lien on income tax revenues, both in amounts of up to \$4 million per month in the event of a default, and the excess from asset sales over \$10 million. Planned use of these proceeds is reported to include enhancement to public safety, technology infrastructure, and blight removal.

Some structural aspects of the city's proposal reflect typical corporate practice, including the super priority pledge; the short tenure for repayment; and the small size of the financing relative to outstanding debt, with the note par amount sized to 5% of the city's outstanding debt, or 2% of its liabilities inclusive of unfunded pension and OPEB costs. However, key differences remain, including the type of facility, type of asset pledged and the proposed use of proceeds, as described below.

- » **Type of Facility:** Private sector DIP financings are bank lending facilities, similar to revolving lines of credit and are not bond-based. Detroit, on the other hand, is proposing a fully-funded note structure, with the expectation that proceeds from asset sales or leases in excess of \$10 million will be the primary source of repayment, thereby freeing up pledged tax revenues as a source of operating cash flow upon note maturity.
- » **Type of Asset Pledged:** The key assets securing a corporate DIP loan are generally tangible assets for which a market value can be reasonably estimated and the loan is normally sized to provide asset coverage substantially in excess of the new funding commitment. Detroit is proposing a stream of two cash flows, in addition to yet-to-be-realized proceeds from the sale or lease of assets. The income and wagering taxes combined are estimated to provide a healthy 2.64 times coverage. While the city has some assets that could be sold off or leased, with the proceeds used to repay the note, the assets are either tied to core operating functions, difficult to value, or some combination of the two, underscoring that a municipality is a going concern and has only limited options to turn to asset liquidation in bankruptcy as compared to a corporation. In that context, Detroit's DIP financing is more naturally secured by a pledge of certain future tax revenue collections rather than hard assets.
- » **Proposed Use of Proceeds:** Detroit's proposed DIP financing plan would immediately deploy 100% of the transaction proceeds. Corporate DIPs loans are traditionally used to provide operating financing and liquidity. Accordingly, one would not normally expect to see a corporate entity draw 100% of the DIP commitment at closing. In Detroit's case, the utilization of all note proceeds highlights the city's ongoing narrow cash position that persists despite already ceasing all debt service payments on liabilities deemed unsecured by the state-appointed emergency manager, as well as deferral of the city's employer contributions to its two pension funds.

### Corporate DIPs loans can support positive creditor outcomes, but the impact of Detroit's plan is uncertain

Corporate DIP financing plans can be a credit positive by providing liquidity that facilitates continued operations, maintains the value of the franchise and potentially paves the way for eventual emergence of the firm from bankruptcy. However, the ultimate credit impact of Detroit's DIP financing proposal, assuming it is approved at both the state and federal level, is unclear given the multitude of contingencies that remain.

**First, the credit impact of the plan on the city's financial position will likely be determined by the ultimate source of repayment for the DIP notes.** Should the city successfully complete the DIP financing plan, it will terminate the outstanding swap agreement associated with the Series 2006 Certificates of Participation. As a result, it is expected that the city will no longer make payments to the counterparties, which are projected to total \$50.6 million annually through 2017. Should the city ultimately repay the notes with proceeds from an asset sale or lease, then the General Fund will retain the tax revenues for general operating expenses. The city will also have gained the \$120 million in Quality of Life proceeds and will have eliminated the risk of a potential termination payment. However, should the city be required to repay the note with casino and income tax revenues, then \$48

million will be set aside annually from each tax revenue source until the note is paid. Ultimately, the total investments of \$120 million from the Quality of Life note and the annual cash flow of \$96 million to the general fund from the two tax revenue sources are not immaterial compared to the city's estimated 2013 General Fund revenues of \$1.1 billion, however there is significant uncertainty related to execution of asset sales that is required for the tax revenues to be freed up.

**Second, it is unclear if the DIP financing's super priority claim on general fund tax revenues would impact existing bondholders.** While the enforceability of a super senior DIP financing for a municipality has not been tested, this pledge could result in a modest reduction of resources available to satisfy defaulted GO, GOLT and COPs bondholders, while also demonstrating a diminished willingness to honor the city's full faith and credit pledge and deterring future creditors from lending to the city. However, should the notes be repaid in full from proceeds from the sale or lease of a city asset, the plan could clear all claims on casino revenue, ultimately improving the position of general obligation and related securities bondholders over the medium term.

**Finally, Detroit's path to solvency and emergence as a financially stable city will take much longer than the 2.5 years expected period of the DIP financing.** The DIP plan may result in additional medium to long-term implications for the city's finances and debt portfolio, especially as it continues crucial negotiations with creditors in the Chapter 9 process. Should it be approved in conjunction with the current forbearance agreement with the counterparties to the city's outstanding swap agreements, the DIP financing plan would result in an unhedged variable rate position on its Series 2006 Certificates of Participation. While any near term cash flow impact is negated so long as the city continues to default on debt service payments, it is unclear as to whether the unhedged position may impact any potential settlements during negotiations with creditors. With respect to the larger negotiating process, it is not known how the completion of the DIP financing proposal could incentivize other creditors to come forth and negotiate with the city. Within the Chapter 9 process specifically, the plan may help illustrate the city's claim that it negotiated in good faith and is thus eligible to proceed under the federal restructuring framework. Finally, the city may be exposing itself to refinancing risk should it be unable to repay the notes within the stated time frame.

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Report Number: 160112

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**Exhibit F**

**Funding for Detroit Announced on Sept. 27, 2013**

Funding for Detroit Announced by Federal Government on Sept. 27, 2013

Announcement		Source of Funds	Use of Funds	Source		Treatment with respect to 10-Year Plan					Inclusion in 10-Y Plan / Additional Comments
(\$mm)		Demolishing Blighted Properties, Revitalizing Neighborhoods and Redeveloping Detroit		Federal / State	Philanthropic / Business	Could reduce Blight Budget	Could Reduce Reinvestment	Does not reduce 10-Y Exp.	Total \$ per Analysis	\$ into the General Fund	
\$ 65.0		HUD Community Development Block Grant	Blight eradication, housing rehabilitation, and other community revitalization efforts	66.2				66.2	66.2	N	Not reflected in 10-Year. Represents non-GF grants received by Planning & Development. See appendix for details
52.0		Treasury TARP Hardest Hit Fund	Blight elimination	52.0		25.6		26.4	52.0	N	Source of funds not accounted in 10 year plan. Could reduce \$500m allocated to blight removal. Funds to go to Detroit Land Bank Authority (DLBA) for blight elimination and development in neighborhoods across the City. DLBA has partnered with Michigan Land Bank, which will do the demolition field management. See appendix for details
10.2		HUD	Affordable housing	10.2				10.2	10.2	N	Previously identified. Not reflected in 10-Year - not related to blight removal. Represents non-GF grants received by Planning & Development. Used to support a wide range of affordable housing programs designed to create better housing opportunities for low- and moderate-income residents. See appendix for details
10.0		Philanthropic and Business Org.	Commercial building demolition		10.0			10.0	10.0	N	Commercial blight removal was not included in 10-year. \$500m allocated to blight removal is related to residential blight
-		HUD CDBG	Commercial building demolition	-				-	-	N	\$5.4 million announced for this program is already accounted for in CDBG line above. Commercial blight removal was not included in 10-year. \$500m allocated to blight removal is related to residential blight
5.0		HUD Neighborhood Stabilization Program 3	Commercial building demolition	5.0				5.0	5.0	N	Commercial blight removal was not included in 10-year. \$500m allocated to blight removal is related to residential blight
5.0		HUD Neighborhood Stabilization Program 2 program income from State	Commercial building demolition	5.0				5.0	5.0	N	Commercial blight removal was not included in 10-year. \$500m allocated to blight removal is related to residential blight
1.5		Ford Foundation	Detroit Land Bank Authority operating support		1.5			1.5	1.5	N	Allocated to fund administrative costs, not demolition activities.
1.1		EPA	Environm. assessments and cleanup of Brownfield sites		1.1			1.1	1.1	N	Environmental assessments and cleanup not included in \$500 million blight removal
1.0		Ford Foundation	Invest Detroit acquisition and predevelopment of residential properties		1.0			1.0	1.0	N	Acquisition and predevelopment activates, not blight removal, including a project on the East Riverfront
0.6		Skillman Foundation	Blight removal		0.6	0.5		0.1	0.6	N	\$500k allocated for blight removal could reduce \$500m. \$100k for blight text technology, not in 10 year plan
151.4		Category Total		138.4	14.2	26.1	-	126.5	152.6		
Improving Public Safety, Reducing Crime, and Decreasing Emergency Response Time											
25.0		FEMA	Hiring 150 firefighters and purchasing arson detection equipment	25.0			22.3	2.7	25.0	Y	SAFER grant already awarded reflected in Fire Dept. grants. New \$25mm award not included in 10 year. Potential Gneral Fund savings estimated as difference between firefighters funded by the general fund in the 10-year plan vs. latest estimate including new SAFER award. See appendix for details
3.0		DOJ	Hiring new police officers, establishing bike patrol, supporting prisoner re-entry programs, and supporting youth anti-violence	1.9				1.9	1.9	Y	Relates to COPs grant for FY2014, 2015 and 2016. Grant \$ already accounted for in 10-Y plan. ~\$2m in FY2014 of COPs grants reflected in Police Department Grant Revenues line item, going away in FY2015. Additional \$1.62 mm of grants per year starting in FY2014 reflected in Police Department, under Department Revenue Initiatives. See appendix for details
1.3		Skillman Foundation & other groups	Improving neighborhood safety and build community policing model with DPD		1.3			1.3	1.3	N	Not included in 10 year baseline or reinvestment. This program would be incremental to any reinvestment amounts assumed in the plan
0.6		Skillman and Kresge Foundations	Improving police CompStat system		0.6		0.6	-	0.6	N	May reduce reinvestment IT funds
29.9		Category Total		26.9	1.9	-	22.9	5.9	28.8		
Improving Transportation Systems for City and Regional Residents											
100.0		Department of Transportation	Transit grants including immediate release of \$24MM to repair and rehabilitate buses and to install security cameras	90.8				90.8	90.8	N	DDOT subsidy in 10-Year Plan and reinvestment amounts assume these funds are received. See appendix for details
30.0		Kresge Foundation	Revolving loan fund for mixed use housing along M-1		30.0			30.0	30.0	N	Not included in 10 year baseline or reinvestment. This program would be incremental to any reinvestment amounts assumed in the plan. See appendix for details
25.0		Department of Transportation TIGER Grant	M1 Rail/Woodward Ave. Streetcar Project	25.0				25.0	25.0	N	Not included in 10 year baseline or reinvestment. This program would be incremental to any reinvestment amounts assumed in the plan. See appendix for details
6.4		Department of Transportation	Helping the Regional Transit Authority to implement regional bus rapid transit	6.4				6.4	6.4	N	Not included in 10 year baseline or reinvestment. This program would be incremental to any reinvestment amounts assumed in the plan. See appendix for details
3.0		Ford Foundation	Support transit oriented development along Woodward Corridor		3.0			3.0	3.0	N	Not included in 10 year baseline or reinvestment. This program would be incremental to any reinvestment amounts assumed in the plan
0.3		Kresge Foundation	Designing transportation system based on Detroit Future City		0.3			0.3	0.3	N	Not included in 10 year baseline or reinvestment. This program would be incremental to any reinvestment amounts assumed in the plan
164.7		Category Total		122.2	33.3	-	-	155.5	155.5		
Helping Create a 21st Century Detroit											
15.0		Ford, Kresge, & Knight Foundations	Cultivating Detroit entrepreneurs and small businesses		15.0			15.0	15.0	N	Not included in 10 year baseline or reinvestment. This program would be incremental to any reinvestment amounts assumed in the plan. See appendix for details
5.0		Private Funding	Classes of Revitalization Fellows		5.0			5.0	5.0	N	
1.0		Ford Foundation	Upgrade City's grants management system		1.0			1.0	1.0	N	
0.5		Knight Foundation & Rock Ventures	Implement Tech Team's recommendations		0.5			0.5	0.5	N	
0.3		Knight Foundation	Grants for enhanced training of public sector and non-profit employees		0.3			0.3	0.3	N	
0.3		Detroit Dev. Fund & Knight Foundation	Foster early stage retail and creative businesses		0.3			0.3	0.3	N	
22.1		Category Total		-	22.1	-	-	22.1	22.1		
\$ 368.1		Total		\$287.5	\$ 71.5	\$ 26.1	\$ 22.9	\$ 310.0	\$ 359.0		

- Newly identified funds coming directly to the City of Detroit
- Previously identified funds, including monies already pledged, funds that are being unlocked for use, and the current year's annually anticipated appropriations
- Private or public funds newly pledged for private sector initiatives or for non-Detroit governmental entities

Demolishing Blighted Properties, Revitalizing Neighborhoods and Redeveloping Detroit												
	HUD Community Development Block Grant ("CDBG")	Treasury TARP Hardest Hit Fund	U.S. Department of Housing and Urban Development ("HUD")									
Amount of Grant in Announcement	\$65 million	\$52 Million	\$10.18 Million									
Actual Grant Funds Awarded	\$66.2 million	\$52 Million	\$10.18 Million									
Benefit to General Fund	\$0	\$25.6 Million	\$0									
Source of Funds	U.S. Department of Housing and Urban Development	Michigan State Housing Development Authority ("MSHDA")	U.S. Department of Housing and Urban Development									
Purpose of Grants	This is a multi-purpose grant with a wide range of uses including: Low to moderate income housing rehab, public facility improvements, property acquisition, and Section 108 loans.	The goal of this funding is to reduce the number of blighted structures	The goal of this grant is to expand the supply of decent, safe, sanitary, and affordable housing, with primary attention to rental housing, for very low-income and low-income families.									
Details of Grant Allocation	<ul style="list-style-type: none"><li>Planning and Development Department allocates CDBG dollars across all divisions (e.g. housing, neighborhood, development, real estate, planning, grants management, etc.). Only a small portion is allocated to demolition</li><li>Below are the allocations for FY 2012/13 and FY 2013/14:<table><tr><td>Period</td><td>CDBG Allocation</td><td>Demolition Allocation</td></tr><tr><td>FY 2012/13</td><td>33,353,509</td><td>2,928,995</td></tr><tr><td>FY 2013/14</td><td>32,877,085</td><td>3,310,736</td></tr></table></li></ul>	Period	CDBG Allocation	Demolition Allocation	FY 2012/13	33,353,509	2,928,995	FY 2013/14	32,877,085	3,310,736	The Detroit Land Bank Authority ("DLBA") was awarded the funds to use in neighborhoods across the city of Detroit. DLBA is the implementation manager and has partnered with the Michigan Land Bank who will perform the demolition field management along with the City of Detroit Buildings Safety Engineering & Environmental Department. The grant allows for the blight removal of a maximum of 4,000 lots at a total cost per lot of \$13,085.85.	The City of Detroit received a HOME Investment Partnership Program Grant ("HOME") allocation of \$5.8 million in FY 2012, has a projected HOME allocation of \$4.3 million in FY 2013, and also has HOME funds available from previous years.
Period	CDBG Allocation	Demolition Allocation										
FY 2012/13	33,353,509	2,928,995										
FY 2013/14	32,877,085	3,310,736										
Use of the Funds	<ul style="list-style-type: none"><li>There are caps on how much can be spent on slum and blight activities - 70% of programming has to go for low/mod income benefit. 20% is allocated to Admin. About 10% of funds would be available to be used for blight removal</li><li>The City has the following CDBG funds available. All of the grants have been allocated:<div>2011/2012 Grants: \$15,886,635 2012/2013 Grants: \$33,353,509 2013/2014 Grants: \$32,877,085 <b>Total Grants Available: \$82,117,229</b></div></li></ul>	<ul style="list-style-type: none"><li>The DLBA has identified publicly owned blighted properties in all of the target areas. The work will begin most heavily in three target areas, Grandmont Rosedale, UDM/ Marygrove and Morningside/EEV/Cornerstone, followed by aggressive strategic removal in Jefferson Chalmers, Southwest and North End. Work will be conducted in all areas simultaneously.</li><li>The DLBA will be reimbursed per unit based on the unit costs estimated by the State, as follows:<div>Demolition: \$11,025 Maintenance: \$750 Acquisition Costs: \$810.85 Project Management Fee: \$500 <b>Total: \$13,085.85</b></div></li><li>The public lots will be acquired free and clear of property taxes.</li><li>Because the HHF Grant is reimbursable, the DLBA will get a line of credit to begin the demolitions.</li><li>The DLBA will acquire lots from the following sources: (a)</li></ul>	<ul style="list-style-type: none"><li>The City anticipates utilizing \$10.1 million of the HOME funds awarded in FY 2012 and FY 2013 for the acquisition/rehabilitation or new construction of rental properties for low and moderate income households with incomes at or below 60% of the Area Median Income. HOME funds will be used to create affordable rental housing opportunities, improve property values, preserve existing housing, and stabilize neighborhoods.</li><li>The City issued a RFP in September 2013 and proposals are due November 26, 2013. Construction on rental properties is expected to start within 6 months of the initial commitment letter and completed with 18 months of initial project closing.</li></ul>									

Demolishing Blighted Properties, Revitalizing Neighborhoods and Redeveloping Detroit			
	HUD Community Development Block Grant ("CDBG")	Treasury TARP Hardest Hit Fund	U.S. Department of Housing and Urban Development ("HUD")
		Wayne County 2013 Tax Foreclosure, (b) City of Detroit, (c) Michigan Land Bank Authority ("MLBFTA"), and (d) some privately held properties. <ul style="list-style-type: none"><li>MSHDA has established an 18 month timeline beginning October 2013 for the removal of blighted structures, however the funds do not expire until late 2017.</li></ul>	
Treatment in 10-Year Plan	<ul style="list-style-type: none"><li>CDBG dollars are not reflected in the 10-Year Plan, since they do not impact the General Fund.</li><li>The 10-Year plan includes a \$500 m estimate for the removal of blighted structures. The estimate was developed knowing that CDBG is a recurring grant that the City receives each year - i.e. the \$500m is incremental to whatever CDBG dollars are allocated to blight removal</li></ul>	The plan currently accounts for the removal of 78,000 structures for \$500 million. This translates to a blight removal cost of approximately \$6,410 per unit. This unit amount represents the low end of the estimated range based on the assumptions that the City would take advantage of economies of scale when demolishing 78,000 structures This grant allows for the removal of 4,000 structures which creates a savings of \$25.6 million in the 10 year plan. (4,000 structures * \$6,410 per structure).	Previously identified. Not reflected in 10-Year - not related to blight removal. Represents non-GF grants received by Planning & Development.
Reimbursement Grant	Yes	Yes	Yes

Improving Public Safety, Reducing Crime, and Decreasing Emergency Response Time																															
	Federal Emergency Management Agency ("FEMA")	Department of Justice ("DOJ")																													
Amount of Grant in Announcement	\$25 million	\$3.0 million																													
Actual Grant Funds Awarded	\$25 million	\$1.9 million																													
Benefit to General Fund	\$22.3 million	\$0																													
Source of Funds	FEMA	DOJ																													
Purpose of Grants	The goal of this grant is to provide funding directly to fire departments in order to help them increase the number of trained firefighters available in their communities.	The COPS Hiring Program grants provide funds directly to law enforcement agencies to hire new or previously laid off police officers.																													
Details of Grant Allocation	The City of Detroit has applied for a \$25 million grant. FEMA Director, Brian Kamoie, indicated that the applications for the FY 2013 SAFER Grant are currently being reviewed and applicants will be notified of grant awards in November 2013.	The City currently has the following three Grants available: <table><tr><th>Grant Year</th><th>Expiration</th><th>Original Grant</th></tr><tr><td>2009 Grant</td><td>12/30/2013</td><td>11,148,750</td></tr><tr><td>2011 Grant</td><td>8/31/2014</td><td>5,694,725</td></tr><tr><td>2013 Grant</td><td>9/30/2016</td><td>1,884,390</td></tr></table>		Grant Year	Expiration	Original Grant	2009 Grant	12/30/2013	11,148,750	2011 Grant	8/31/2014	5,694,725	2013 Grant	9/30/2016	1,884,390																
Grant Year	Expiration	Original Grant																													
2009 Grant	12/30/2013	11,148,750																													
2011 Grant	8/31/2014	5,694,725																													
2013 Grant	9/30/2016	1,884,390																													
Use of the Funds	The City plans to hire 150 new fire fighters.	The City plans to hire 10 additional police officers.																													
Treatment in 10-Year Plan	<ul style="list-style-type: none"><li>The 10 year plan assumes that the Fire Department has a total of 1,228 employees covered by the General Fund by the end of FY 2014.</li><li>As of September 2013, there were a total of 1,139 employees. The City expects to have a total of 1,244 employees after accounting for new hires currently in the Academy, new hires based on this grant, and the loss of employees related to prior SAFER grant expirations. Of these 1,244 employees, 150 will be SAFER funded and 1,094 will be funded through the General Fund.</li></ul> <table><tr><th>Revised Plan</th><th>Firefighters</th><th>Other Employees</th><th>Total Employees</th></tr><tr><td>Current Employees</td><td>842</td><td>297</td><td>1,139</td></tr><tr><td>Promotion to Fire Marshal</td><td>-20</td><td>20</td><td>0</td></tr><tr><td>New Hires in Academy</td><td>90</td><td>0</td><td>90</td></tr><tr><td>New SAFER Hires</td><td>150</td><td>0</td><td>150</td></tr><tr><td>Employee reduction do to prior SAFER expiration</td><td>-135</td><td>0</td><td>-135</td></tr><tr><td>Total Employees</td><td>927</td><td>317</td><td>1,244</td></tr></table> <ul style="list-style-type: none"><li>The SAFER grant will reduce the number of employees funded by the General Fund by 134 (from 1,228 in the 10-Year Plan to 1,094 in the revised expectations). As a result, the SAFER grant will result in a savings of approximately \$22 million (134/150 * \$25 million).</li></ul>	Revised Plan	Firefighters	Other Employees	Total Employees	Current Employees	842	297	1,139	Promotion to Fire Marshal	-20	20	0	New Hires in Academy	90	0	90	New SAFER Hires	150	0	150	Employee reduction do to prior SAFER expiration	-135	0	-135	Total Employees	927	317	1,244	<ul style="list-style-type: none"><li>The 10 Year plan includes \$2 million for the 2011 COPS Hiring Program Grant which expires in August 2014.</li><li>The Plan also includes an additional \$1.62 million per year of grants which would cover the 2013 COPS Hiring Grant.</li></ul>	
Revised Plan	Firefighters	Other Employees	Total Employees																												
Current Employees	842	297	1,139																												
Promotion to Fire Marshal	-20	20	0																												
New Hires in Academy	90	0	90																												
New SAFER Hires	150	0	150																												
Employee reduction do to prior SAFER expiration	-135	0	-135																												
Total Employees	927	317	1,244																												
Reimbursement Grant	Yes	Yes																													



Improving Transportation Systems for City and Regional Residents									
Department of Transportation									
Amount of Grant in Announcement	\$100 million								
Actual Grant Funds Awarded	\$90.8 million								
Benefit to General Fund	\$0								
Source of Funds	Federal Transit Administration ("FTA") and MDOT								
Purpose of Grants	The FTA has awarded the City several grants that provide Detroit with capital, operating and evaluation assistance for transportation facilities.								
Details of Grant Allocation	The FTA and MDOT have awarded the City of Detroit the funds below. The US Government shut down has delayed the awarding of the 5309 and 5339								
	Program	Grant Details	FTA Grant	MDOT Grant	Total Grant	Type	13c Status	Funding Year	Award Date
	5307 Formula Grants	Preventive Maintenance (28.9) Fac Rehab (7.5), Overhaul (12.5), SupportVeh (1.2), Shelters (.6), Security (.6), Com (.6), Dev/Planning (2.5), Misc (.2)	43.7	10.9	54.6	Operating Grant	Awaiting Certification	2012/2013	Pending
	5307 CMAQ Grant	Lease Payments	3.3	0.8	4.1	Capital Grant		2013	8/30/2013
	5309 Grants		0.3	0.1	0.4	Capital Grant		2011	7/15/2013
	5309 Grants	Overhaul (12), Security (3), AVL (3.8), Leases (7.5), Coolidge (.7)	21.5	5.4	26.9	Capital Grant	Certified	2012	Pending
	5339 Grants	Bus stops/ facilities/ shelters	2.1	0.5	2.6	Capital Grant	Certified	2013	Pending
	5316 Grant	Job Access Grants	0.6	0.6	1.3	Operating Grant		2011	8/27/2013
	5317 Grant	New Freedom Grants	0.4	0.4	0.9	Operating Grant		2011	8/26/2013
	Total		\$ 72.0	\$ 18.8	\$ 90.8				
Use of the Funds	The majority of the funds will be used in preventative maintenance and bus overhaul and security. Only approximately \$4.5 million has been spent so far. To spend the funds DDOT must release an RFP and then hold a bid process.								
Treatment in 10-Year Plan	These grants are not new, they are recurring programs that DDOT relies upon to fund its capital and maintenance programs. DDOT subsidy in 10-Year Plan and reinvestment amounts assume FTA grants continue to be received. Operating grants are reflected in 10 year plan under grant line. Capital grants are reflected in historical amounts under the grant line item, but not reflected in projections as they are assumed to have a net effect on DDOT subsidy projections								
Reimbursement Grant	Yes								

Improving Transportation Systems for City and Regional Residents			
	Kresge Foundation	Department of Transportation TIGER Grant	Department of Transportation
Amount of Grant in Announcement	\$30 million	\$25 million	\$6.4 million
Actual Grant Funds Awarded	NA	\$25 million	\$6.4 million
Benefit to General Fund	\$0	\$0	\$0
Source of Funds	Kresge Foundation and NCB Capital Impact	Federal Transit Administration ("FTA")	US Department of Transportation
Purpose of Grants	The Kresge Foundation and NCB Capital Impact, a community development finance institution, have launched the Woodward Corridor Investment Fund ("The Fund"), a \$30.25 million effort to provide capital for the redevelopment of Detroit's Woodward Corridor.	The Transportation Investment Generating Economic Recovery or TIGER Discretionary Grant program allows the U.S. Department of Transportation to invest in road, rail, transit and port projects that promise to achieve critical national objectives.	The purpose of the Regional Transit Authority ("RTA") to coordinate the activities of the existing transit agencies within its jurisdiction and secure funding to improve and enhance public transportation.
Details of Grant Allocation	The Fund will provide long-term fixed-rate loans for the development of multi-family and mixed use projects along Woodward Avenue.	<ul style="list-style-type: none"><li>The grant will be used for Detroit's M1-Rail project to build a light rail line on Woodward Avenue in the city's downtown.</li><li>The M1-Rail project is also funded by the non- profit M-1 Rail Corp which is a coalition of private businesses, foundations, and public and private institutions. The M-1 Rail Corp ("M-1") has committed more than \$100 million toward construction and operation of the \$137 million project. The remainder will be funded by state and local sources. M-1 will initially operate the streetcar line.</li></ul>	The funds were awarded to the RTA which was created in December 2012. It is comprised of the counties of Macomb, Oakland, Washtena, and Wayne.
Use of the Funds	The Fund began accepting applications on October 1, 2013 and initial loan approvals will be made before the end of 2013 for projects that will start construction before the end of 2014.	<ul style="list-style-type: none"><li>The City of Detroit has entered into an inter- governmental agreement with MDOT to manage the \$25 million grant for M-1.</li><li>MDOT will draw the funds from the FTA and M-1 will spend the funds.</li><li>The Department of Public Works will manage the city side.</li></ul>	A program has not been announced for the use of the funds. The RTA does not have permanent funding sources, so the agency may hold the funds for administrative purposes.
Treatment in 10-Year Plan	Not included in 10 year baseline or reinvestment. This program would be incremental to any reinvestment amounts assumed in the plan	Not included in 10 year baseline or reinvestment. This program would be incremental to any reinvestment amounts assumed in the plan	Not included in 10 year baseline or reinvestment. This program would be incremental to any reinvestment amounts assumed in the plan
Reimbursement Grant	NA	Yes	



Helping Create a 21st Century Detroit (Philanthropic Grants)			
Institution	Description	Amount	Grant Purpose
Ford, Kresge, & Knight Foundations	Cultivating Detroit entrepreneurs and small businesses	\$15 million	The Knight, Ford and Kresge Foundations committed a combined \$15 million to the New Economy Initiative. The Group is working to transform Detroit’s economy by building a network of support for entrepreneurs and small businesses.
Private Funding	Classes of Revitalization Fellows	\$5 million	Fellows work for two-year term at a relevant Detroit organization while the program provides them with executive-style education opportunities, coaching, leadership development and the chance to work on many of the city's economic and urban development initiatives. The Ford Foundation and the Kresge Foundation have committed a combined \$5 million to the program. There are currently no Revitalization Fellows placed in any City of Detroit departments.
Ford Foundation	Upgrade City's grants management system	\$1 million	Public Consulting Group (“PCG”) conducted a month-long assessment of the City's grant management capabilities. The \$127K study was funded by the Ford Foundation and concluded at the end of October. PCG has developed an implementation plan to set up a central grants management office (“GMO”) to provide better oversight on grants. Their proposed plan would cost ~\$1.7M and will create a transitional GMO by March 2014, with a full implementation completed by March 2015; full implementation is predicated on a system-wide ERP upgrade, which takes 9-12 months.
Knight Foundation & Rock Ventures	Implement Tech Team's recommendations	\$0.5 million	Detroit Future City was provided \$250,000 to fund the human capital necessary to put in place recommendations from a White House-led information technology team, as part of a long-term, strategic plan for a prosperous Detroit developed by city officials and the community.
Knight Foundation	Grants for enhanced training of public sector and non-profit employees	\$0.3 million	Community Foundation for Southeast Michigan was provided \$250,000 to fund fifty \$5,000 capacity grants to subsidize training for public sector and nonprofit staff who are advancing the future of Detroit in areas of economic growth, land use, city systems, planning and neighborhoods (the Detroit Future City “Elements”).
Detroit Dev. Fund & Knight Foundation	Foster early stage retail and creative businesses	\$0.3 million	Detroit Development Fund was provided \$250,000 to support early stage retail and creative businesses in Detroit and furthering the organization’s mission to revitalize economically distressed areas in the city.

## **Exhibit G**

### **Cash Flow Variance Report June 2013**

Detroit/27:11:2013 11:54

Work in Process - Subject to Material Change

The attached cash flows ("Monthly Cash Flow"), its assumptions and underlying data are the product of the Client and its management ("Management") and consist of information obtained solely from the Client. With respect to prospective financial information relative to the Client, Ernst & Young LLP ("EY") did not examine, compile or apply agreed upon procedures to such information in accordance with attestation standards established by the AICPA and EY expresses no assurance of any kind on the information presented. It is the Client's responsibility to make its own decision based on the information available to it. Management has the knowledge, experience and ability to form its own conclusions related to the Client's Monthly Cash Flow. There will usually be differences between forecasted and actual results because events and circumstances frequently do not occur as expected and those differences may be material. EY takes no responsibility for the achievement of forecasted results. Accordingly, reliance on this report is prohibited by any third party as the projected financial information contained herein is subject to material change and may not reflect actual results.

General Fund cash activity and the forecasts herein are based on estimated cash activity for the General Fund main operating account. In addition to General Fund cash (fund 1000), the main operating account also contains cash balances and cash activity of the Risk Management Fund, Construction Fund, Street Funds, Solid Waste Fund, General Grants, and Motor Vehicle Fund ("other funds"). While the cash balances related to these other funds are pooled with General Fund cash, the City does maintain a separate accounting of due to/from balances for each fund. Since the General Fund commonly borrows from other funds, actual cash balance in these accounts at any given point in time is higher than that which actually belongs solely to the General Fund.

\$ in millions

	<u>FY 2014</u>
Ending cash - Forecast (11A+1F)	\$ 14.1
Ending cash - Actual	36.0
Favorable variance	<u>\$ 21.9</u>
<u>Reconciling items:</u>	
Missed COP payment	\$ 39.7
Escrow proceeds not drawn	(20.0)
Property tax receipts lower (net impact)	(9.6)
DDOT actual cash subsidy lower than forecast	8.7
Miscellaneous other	3.1
Sub-total reconciling items	<u>21.9</u>

\$ in millions	Forecast	Actual		
	Jun-13	Jun-13	Variance	Comments
Operating Receipts				
Property taxes	\$ 58.0	\$ 44.6	\$ (13.4)	Actual amount lower than estimate from County; Net impact ~\$10m (combine with distributions and accum prop tax accrual)
Income & utility taxes	18.4	18.4	(0.0)	
Gaming taxes	9.2	5.6	(3.5)	
Municipal service fee to casinos	-	-	-	
State revenue sharing	-	-	-	~\$5m held by custodian as of 6/30/2013; since cash was held by custodian, monthly swap payment (\$4.2m) was not made; cash has subsequently been released by custodian to City and June swap set-aside has been made
Other receipts	19.4	33.5	14.1	Primarily due to inter-fund receipts for true-up of inter-agency billings coincident with fiscal year end
Refinancing proceeds	20.0	-	(20.0)	Proceeds not drawn; funds remain in escrow (see "memo" below)
Total operating receipts	125.0	102.1	(22.9)	
Operating Disbursements				
Payroll, taxes, & deductions	(27.2)	(27.7)	(0.5)	
Benefits	(16.0)	(17.1)	(1.1)	
Pension contributions	-	-	-	
Subsidy payments	(10.9)	(2.2)	8.7	Cash needs of DDOT lower primarily due to no risk mgmt premium, missed COP payment, and deferral of pension contributions
Distributions (w/o DDA increment)	(27.2)	(7.7)	19.5	Partially due to small prop tax collection; but majority is deferred until FY14 and captured below in "accumulated prop tax distr" accrual
DDA increment distributions	(5.5)	(6.2)	(0.7)	
Income tax refunds	(3.8)	(5.6)	(1.9)	
A/P and other disbursements	(32.2)	(34.9)	(2.7)	Primarily due to grant related and inter-fund disbursements (funded by favorable variance in "other receipts" above)
Sub-total operating disbursements	(122.8)	(101.3)	21.4	
POC and debt related payments	(36.6)	2.3	39.0	Primarily due to missed COP payment ~\$39.7m
Total disbursements	(159.4)	(99.0)	60.4	
Net cash flow	(34.4)	3.1	37.5	
Cumulative net cash flow				
Beginning cash balance	68.2	68.2	-	
Net cash flow	(34.4)	3.1	37.5	
Cash before required distributions	\$ 33.8	\$ 71.3	\$ 37.5	
Accumulated property tax distributions	(19.7)	(35.3)	(15.6)	Higher accrual due to deferred distributions above
Cash net of distributions	\$ 14.1	\$ 36.0	\$ 21.9	
Memo:				
Accumulated deferrals (estimated)	(118.7)	(118.7)	-	
Missed COP payment 6/14/13	-	(39.7)	(39.7)	
Refunding bond proceeds in escrow	51.7	71.7	20.0	
Reimbursements owed to other funds	tbd	tbd	tbd	

\$ in millions

	4	5	4	4	5	4	4	5	4	4	5	4	
	Actual	Actual	Actual	Actual	Actual	Actual	Actual	Actual	Actual	Actual	Actual	Actual	Preliminary
	Jul-12	Aug-12	Sep-12	Oct-12	Nov-12	Dec-12	Jan-13	Feb-13	Mar-13	Apr-13	May-13	Jun-13	FY 2013
<b>Operating Receipts</b>													
Property taxes	\$ 34.0	\$ 198.0	\$ 14.8	\$ 6.9	\$ 4.2	\$ 24.4	\$ 139.1	\$ 42.3	\$ 5.4	\$ 1.3	\$ 3.1	\$ 44.6	\$ 518.2
Income & utility taxes	23.1	25.1	21.5	25.8	23.6	21.9	25.4	23.9	20.4	30.2	30.8	18.4	290.1
Gaming taxes	12.4	15.2	17.2	12.4	20.8	11.0	11.5	19.6	14.4	12.8	16.5	5.6	169.5
Municipal service fee to casinos	-	7.6	-	-	4.0	4.0	1.8	-	-	-	-	-	17.4
State revenue sharing	28.5	-	28.7	-	30.9	-	30.4	-	30.6	-	29.7	-	178.9
Other receipts	26.1	37.8	26.0	22.5	26.6	31.7	16.7	58.0	25.6	29.3	41.4	33.5	375.3
Refinancing proceeds	-	-	-	-	-	10.0	-	-	-	-	-	-	10.0
<b>Total operating receipts</b>	<b>124.2</b>	<b>283.8</b>	<b>108.2</b>	<b>67.5</b>	<b>110.1</b>	<b>103.1</b>	<b>225.0</b>	<b>143.9</b>	<b>96.5</b>	<b>73.6</b>	<b>121.4</b>	<b>102.1</b>	<b>1,559.3</b>
<b>Operating Disbursements</b>													
Payroll, taxes, & deductions	(37.5)	(35.0)	(32.5)	(28.0)	(41.1)	(30.1)	(23.6)	(30.1)	(25.9)	(26.3)	(36.2)	(27.7)	(374.0)
Benefits	(18.3)	(21.0)	(20.4)	(16.7)	(16.2)	(19.5)	(9.7)	(15.8)	(17.7)	(4.7)	(14.9)	(17.1)	(192.1)
Pension contributions	-	(11.7)	(7.2)	-	(1.2)	(8.8)	(1.9)	-	-	-	-	-	(30.8)
Subsidy payments	(0.6)	(4.9)	(6.2)	(1.1)	-	(0.1)	(0.2)	(5.7)	(5.0)	(3.9)	(1.6)	(2.2)	(31.4)
Distributions (w/o DDA increment)	(0.9)	(111.6)	(45.3)	(3.4)	(4.2)	(1.5)	(8.1)	(80.7)	(66.9)	(1.9)	-	(7.7)	(332.3)
DDA increment distributions	-	-	-	-	-	-	(5.9)	-	-	-	-	(6.2)	(12.1)
Income tax refunds	(1.9)	(3.3)	(0.6)	-	(1.8)	(1.0)	(0.5)	(0.4)	(0.4)	(1.9)	(1.6)	(5.6)	(19.1)
A/P and other disbursements	(43.8)	(48.1)	(34.5)	(31.4)	(37.1)	(25.2)	(24.3)	(34.7)	(29.3)	(27.7)	(36.9)	(34.9)	(408.0)
Sub-total operating disbursements	(103.1)	(235.7)	(146.8)	(80.6)	(101.7)	(86.1)	(74.1)	(167.4)	(145.0)	(66.5)	(91.3)	(101.3)	(1,399.7)
POC and debt related payments	(4.2)	(5.4)	(4.9)	(9.0)	(7.9)	(14.9)	(3.1)	(8.5)	(4.8)	(32.2)	(25.6)	2.3	(118.1)
<b>Total disbursements</b>	<b>(107.3)</b>	<b>(241.1)</b>	<b>(151.7)</b>	<b>(89.6)</b>	<b>(109.6)</b>	<b>(101.0)</b>	<b>(77.2)</b>	<b>(175.9)</b>	<b>(149.8)</b>	<b>(98.8)</b>	<b>(116.9)</b>	<b>(99.0)</b>	<b>(1,517.9)</b>
<b>Net cash flow</b>	<b>16.9</b>	<b>42.6</b>	<b>(43.5)</b>	<b>(22.0)</b>	<b>0.5</b>	<b>2.1</b>	<b>147.8</b>	<b>(32.1)</b>	<b>(53.3)</b>	<b>(25.2)</b>	<b>4.6</b>	<b>3.1</b>	<b>41.5</b>
Cumulative net cash flow	16.9	59.5	16.0	(6.0)	(5.5)	(3.4)	144.4	112.3	59.0	33.9	38.4	41.5	
Beginning cash balance	29.8	46.7	89.3	45.8	23.8	24.3	26.4	174.2	142.1	88.8	63.7	68.2	29.8
Net cash flow	16.9	42.6	(43.5)	(22.0)	0.5	2.1	147.8	(32.1)	(53.3)	(25.2)	4.6	3.1	41.5
<b>Cash before required distributions</b>	<b>\$ 46.7</b>	<b>\$ 89.3</b>	<b>\$ 45.8</b>	<b>\$ 23.8</b>	<b>\$ 24.3</b>	<b>\$ 26.4</b>	<b>\$ 174.2</b>	<b>\$ 142.1</b>	<b>\$ 88.8</b>	<b>\$ 63.7</b>	<b>\$ 68.2</b>	<b>\$ 71.3</b>	<b>\$ 71.3</b>
Accumulated property tax distributions	(48.1)	(77.8)	(31.8)	(32.7)	(31.2)	(47.4)	(149.3)	(89.0)	(26.4)	(25.5)	(27.9)	(35.3)	(35.3)
<b>Cash net of distributions</b>	<b>\$ (1.4)</b>	<b>\$ 11.5</b>	<b>\$ 14.1</b>	<b>\$ (8.9)</b>	<b>\$ (6.9)</b>	<b>\$ (21.0)</b>	<b>\$ 24.9</b>	<b>\$ 53.1</b>	<b>\$ 62.4</b>	<b>\$ 38.2</b>	<b>\$ 40.3</b>	<b>\$ 36.0</b>	<b>\$ 36.0</b>
<b>Memo:</b>													
Accumulated deferrals (estimated)	(66.2)	(56.3)	(50.9)	(52.7)	(53.2)	(46.3)	(44.2)	(53.9)	(57.7)	(61.5)	(65.8)	(118.7)	(118.7)
Missed COP payment 6/14/13	-	-	-	-	-	-	-	-	-	-	-	(39.7)	(39.7)
Refunding bond proceeds in escrow	28.6	81.7	81.7	81.7	81.7	71.7	71.7	71.7	71.7	71.7	71.7	71.7	71.7
Reimbursements owed to other funds	tbd	tbd	tbd	tbd	tbd	tbd	tbd	tbd	tbd	tbd	tbd	tbd	tbd

## **Exhibit H**

### **Cash Flow Variance Report FY 2014**

# Project Piston

## Cash Flow Variance Report

### FY 2014 (July through September)

#### Work in Process - Subject to Material Change

Information contained herein has not been independently verified and is subject to material change based on continuing review. Accordingly, the information contained herein is not intended to be and should not be relied upon by any third party or as legal, auditing, or accounting advice

The attached cash flow analysis, its assumptions and underlying data are the product of the Client and its management ("Management") and consist of information obtained solely from the Client. With respect to prospective financial information relative to the Client, Ernst & Young LLP ("EY") did not examine, compile or apply agreed upon procedures to such information in accordance with attestation standards established by the AICPA and EY expresses no assurance of any kind on the information presented. It is the Client's responsibility to make its own decision based on the information available to it. Management has the knowledge, experience and ability to form its own conclusions related to the Client's cash flow analysis. There will usually be differences between forecasted and actual results because events and circumstances frequently do not occur as expected and those differences may be material. EY takes no responsibility for the achievement of forecasted results. Accordingly, reliance on this report is prohibited by any third party as the projected financial information contained herein is subject to material change and may not reflect actual results.

#### NOTE:

General Fund cash activity and the forecasts herein are based on estimated cash activity for the General Fund main operating account. In addition to General Fund cash (fund 1000), the main operating account also contains cash balances and cash activity of the Risk Management Fund, Construction Fund, Street Funds, Solid Waste Fund, General Grants, and Motor Vehicle Fund ("other funds"). While the cash balances related to these other funds are pooled with General Fund cash, the City does maintain a separate accounting of due to/from balances for each fund. Since the General Fund commonly borrows from other funds, actual cash balance in these accounts at any given point in time is higher than that which actually belongs solely to the General Fund.



\$ in millions

	As of
	9/27/13
Ending cash net of distributions - Forecast Restructuring Scenario (September)	\$ 102.8
Ending cash net of distributions - Actual (September)	128.5
Favorable variance (see components below)	\$ 25.7

Major variances (details on subsequent page):

FY 2013 variance from June (see <b>Memo 1</b> )	\$ (10.4)	See <b>Memo 1</b> below
Property tax (net impact of collections, distributions, and change in accrual)	(0.0)	
Income tax receipts lower (net impact)	(4.3)	Timing
Gaming tax receipts higher (net impact)	9.5	Timing - large receipt forecast in early Oct was received in Sept
Other receipts higher	14.8	Timing - \$3m grants; \$4m DPS catch up; \$4m voided checks
Payroll and benefits higher	(4.4)	
Cash subsidy to DDOT lower	3.8	Timing
AP and professional fee payments lower	16.7	Timing - primarily due to vendor payment management process
Miscellaneous other variances / rounding	(0.0)	
<b>Sub-total major variances</b>	<b>\$ 25.7</b>	

### Memo 1:

June variance actual vs. Restructuring Scenario Forecast	\$	46.4	Ending cash June (Forecast)
		36.0	Ending cash June (Actual)
	\$	<b>(10.4)</b>	

Major variances (June):

Escrow proceeds not drawn in June	\$ (20.0)
DDOT subsidy not made	8.7
Miscellaneous other variances	0.9
	<u>\$ (10.4)</u>

\$ in millions	Forecast	Actual	Forecast	Actual	Forecast	Actual	FYTD Forecast	FYTD Actual	Variance	Ref.
	Jul-13	Jul-13	Aug-13	Aug-13	Sep-13	Sep-13	Jul-Sep	Jul-Sep		
Operating Receipts										
Property taxes	\$ 37.8	\$ 32.7	\$ 166.6	\$ 177.5	\$ 13.0	\$ 27.5	\$ 217.5	\$ 237.6	\$ 20.2	A
Income & utility taxes	28.7	25.8	22.7	21.8	22.3	21.0	73.7	68.6	(5.0)	B
Gaming taxes	14.6	21.2	14.1	12.7	8.9	17.5	37.7	51.4	13.7	C
Municipal service fee to casinos	-	-	7.6	7.3	-	-	7.6	7.3	(0.3)	
State revenue sharing	30.7	30.1	-	-	30.7	30.5	61.4	60.6	(0.8)	
Other receipts	26.2	31.8	24.8	33.7	24.9	26.5	76.0	92.0	16.0	D
Financing proceeds	-	-	-	-	-	-	-	-	-	
Total operating receipts	138.1	141.6	235.9	252.9	99.9	123.1	473.8	517.5	43.7	
Operating Disbursements										
Payroll, taxes, & deductions	(31.0)	(33.9)	(26.6)	(29.4)	(26.6)	(25.9)	(84.1)	(89.2)	(5.0)	E
Benefits	(15.5)	(13.8)	(15.5)	(14.5)	(15.5)	(17.5)	(46.4)	(45.8)	0.6	
Pension contributions	-	-	-	-	-	-	-	-	-	
Subsidy payments	(5.3)	(3.3)	(2.8)	(0.1)	(4.1)	(5.0)	(12.3)	(8.4)	3.8	F
Distributions - tax authorities	(14.8)	-	(72.4)	(83.2)	(40.0)	(20.7)	(127.2)	(103.9)	23.3	G
Distributions - UTGO	-	-	-	-	-	-	-	-	-	
Distributions - DDA increment	-	-	-	-	-	-	-	-	-	
Income tax refunds	(2.5)	(2.6)	(2.7)	(1.1)	(0.6)	(1.3)	(5.8)	(5.0)	0.8	
A/P and other disbursements	(41.3)	(44.2)	(42.9)	(25.0)	(34.3)	(27.7)	(118.4)	(96.9)	21.5	H
Professional fees	-	(2.3)	-	(1.5)	-	(1.0)	-	(4.8)	(4.8)	I
Sub-total operating disbursements	(110.4)	(100.2)	(162.9)	(154.7)	(120.9)	(99.2)	(394.2)	(354.1)	40.1	
POC and debt related payments	(7.4)	(11.6)	(4.2)	(4.2)	(7.3)	(7.3)	(18.9)	(23.2)	(4.3)	J
Total disbursements	(117.7)	(111.8)	(167.1)	(159.0)	(128.3)	(106.5)	(413.1)	(377.2)	35.9	
Net cash flow	20.4	29.8	68.8	93.9	(28.4)	16.6	60.7	140.3	79.5	
Cumulative net cash flow										
Beginning cash balance	66.1	71.3	86.4	101.1	155.2	195.0	66.1	71.3	5.2	
Net cash flow	20.4	29.8	68.8	93.9	(28.4)	16.6	60.7	140.3	79.5	
Cash before required distributions	\$ 86.4	\$ 101.1	\$ 155.2	\$ 195.0	\$ 126.8	\$ 211.6	\$ 126.8	\$ 211.6	\$ 84.8	
Accumulated property tax distributions	(29.8)	(56.9)	(55.4)	(85.7)	(24.0)	(83.1)	(24.0)	(83.1)	(59.1)	K
Cash net of distributions	\$ 56.6	\$ 44.3	\$ 99.8	\$ 109.4	\$ 102.8	\$ 128.5	\$ 102.8	\$ 128.5	\$ 25.7	
Memo:										
Refunding bond proceeds in escrow	51.7	79.5	51.7	79.5	51.7	79.5	51.7	79.5	27.8	L
Reimbursements owed to other funds	tbd	tbd	tbd	tbd	tbd	tbd	tbd	tbd	tbd	

Footnotes:

A Actual amount higher due to timing of receipts; expected to reverse in subsequent weeks

B Actual amount lower due to timing of receipts; expected to reverse in subsequent weeks

C ~\$5m due to cash held by custodian as of 6/30/2013 and remitted to City in July; off-set by June swap payment made in July; ~\$8m related to early receipt of cash forecasted in first week of October

D Primarily due to grant receipts, voided checks due to Ch9 filing, catch up payments from DPS, and unposted property and income tax collections; expected to reverse in subsequent weeks

E Primarily due to delay of 10% wage cut implementation, overtime, separation payments and Federal Income tax true-up

F Timing related variance based on lower working capital needs of DDOT; expected to reverse in subsequent months

G Timing related variance; distributions are accrued below in "accumulated property tax distribution" line; net zero impact

H Primarily due to vendor management and delays in disbursements due to bankruptcy process; expected to reverse in subsequent weeks given significant amount of invoices discovered

I Professional fees were shown "below-the-line" in original forecast, but have been moved for presentational purposes

J June 2013 POC swap payment not made until July; off-set by higher casino receipts above (net zero impact)

K Higher accrual due to cumulative distribution payments not yet made since June and higher property tax collections

L \$20m was not drawn in June and currently forecast not to be drawn until Dec 2013; \$7.8m was funded into account for FY14 self-insurance requirement

**Exhibit I**

**Syncora Proposal**



## DIP Term Sheet

October 25, 2013

Strictly confidential

# 1 DIP Term Sheet

Key Terms	
Borrower	■ City of Detroit ("Detroit")
Lenders	■ Syncora Capital Assurance Inc. ("SCAI") and other lenders, designated by SCAI
Commitment Amount	■ \$350 million DIP Term Loan Facility ("Term Loan")
Interest Rate	■ 1-month LIBOR + 230 basis points (cash pay). LIBOR at all times shall be deemed to be not less than 1.00% per annum
Maturity	■ Earlier of dismissal of the Bankruptcy case, confirmation of the Plan of Adjustment or 30 months, with an option to extend
Origination Fee	■ 1.25%
Collateral	■ First priority lien on the Pledged Wagering Tax Revenue ■ First priority lien on the Income Tax Revenue of Detroit with creation of a trust acceptable to the Lenders
Mandatory Redemption	■ Consistent with Barclays' Proposal

## 2 Key benefits to Detroit

The SCAI Proposal is superior to the Barclays' Proposal on numerous grounds:

Key Terms	SCAI's Proposal	Barclays' Proposal	Comments
<b>Commitment Amount</b>	■ \$350 million	■ \$350 million	■ Same
<b>Interest Rate</b>	■ 1-month LIBOR + 230 basis points (cash pay). LIBOR at all times shall be deemed to be not less than 1.00% per annum	■ 1-month LIBOR + 250 basis points (cash pay). LIBOR at all times shall be deemed to be not less than 1.00% per annum	■ SCAI's Proposal is 20 basis points lower
<b>Maturity</b>	■ Earlier of dismissal of the Bankruptcy case, the confirmation of the Plan of Adjustment or 30 months, with optional extension provision	■ Earlier of dismissal of the Bankruptcy case, confirmation of the Plan of Adjustment or 30 months	■ SCAI's Proposal includes an optional extension provision
<b>Origination Fee</b>	■ 1.25%	■ 1.25%	■ Same
<b>Collateral</b>	■ First priority lien on the Pledged Wagering Tax Revenue ■ First priority lien on the Income Tax Revenue of Detroit with a creation of a trust acceptable to the Lenders	■ First priority lien on the Pledged Wagering Tax Revenue ■ First priority lien on the Income Tax Revenue of Detroit ■ Asset Proceeds Collateral	■ Same
<b>Mandatory Redemption</b>	■ Consistent with Barclays' Proposal	■ The City shall utilize all net proceeds of the voluntary disposition or monetization of any City owned asset (the "Asset Proceeds Collateral") which generates net cash proceeds exceeding \$10 million to redeem the note	■ Same
<b>Use of Funds</b>	■ Subject to Detroit discretion	■ Proceeds from the Quality of Life Note to fund expenditures designed to contribute to the improvement of the quality of life in Detroit. Proceeds from the Swap Termination Note to pay amounts required under the Forbearance Agreement to terminate the underlying swaps as approved by the Bankruptcy Court	■ SCAI's Proposal provides for greater flexibility
<b>Events of Default</b>	■ Customary Events of Default provisions	■ An event of default is triggered if the City ceases to be under the control of an emergency manager for a period of thirty (30) days unless a Transition Advisory Board or consent agreement reasonably determined by the Purchaser to ensure continued financial responsibility shall have been established	■ SCAI's Proposal excludes such provision

**Exhibit J**

**Hr'g Tr., Oct. 15, 2013**

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, . Docket No. 13-53846  
MICHIGAN, .  
 . Detroit, Michigan  
 . October 15, 2013  
Debtor. . 10:00 a.m.  
 . . . . .

HEARING RE. OBJECTIONS TO ELIGIBILITY TO CHAPTER 9 PETITION  
BEFORE THE HONORABLE STEVEN W. RHODES  
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor: Jones Day  
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For Detroit Retirement Systems-General Retirement System of Detroit, Police and Fire Retirement System of the City of Detroit: Clark Hill, PLC  
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For the Flowers Plaintiffs:	Law Offices of William A. Wertheimer By: WILLIAM WERTHEIMER 30515 Timberbrook Lane Bingham Farms, MI 48025 (248) 644-9200
For the Detroit Fire Fighters Association, the Detroit Police Officers Associa- tion and the Detroit Police Lieutenants & Sergeants Association:	Erman, Teicher, Miller, Zucker & Freedman, P.C. By: BARBARA A. PATEK 400 Galleria Officentre, Suite 444 Southfield, MI 48034 (248) 827-4100
Interested Party:	KRYSTAL CRITTENDON 19737 Chesterfield Detroit, MI 48221
For Retired Detroit Police Members Association:	Strobl & Sharp, PC By: LYNN M. BRIMER 300 East Long Lake Road, Suite 200 Bloomfield Hills, MI 48304-2376 (248) 540-2300
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Proceedings recorded by electronic sound recording,  
 transcript produced by transcription service.

1 THE CLERK: All rise. Court is in session. Please  
2 be seated. Case Number 13-53846, City of Detroit, Michigan.

3 THE COURT: Good morning, everybody. I'd like to  
4 take appearances from the attorneys who will be speaking here  
5 today first. Can we do that?

6 MR. BENNETT: Thank you, your Honor. Bruce Bennett,  
7 Jones Day, on behalf of the city.

8 MS. NELSON: Good morning, your Honor. Assistant  
9 Attorney General Margaret A. Nelson on behalf of the State of  
10 Michigan.

11 MS. LEVINE: Good morning, your Honor. Sharon  
12 Levine, Lowenstein Sandler, for AFSCME.

13 MR. GORDON: Good morning, your Honor. Robert  
14 Gordon of Clark Hill on behalf of the Detroit Retirement  
15 Systems.

16 MR. MONTGOMERY: Good morning, your Honor. Claude  
17 Montgomery, Dentons U.S., for the Official Committee of  
18 Retirees.

19 MS. CECCOTTI: Good morning, your Honor. Babette  
20 Ceccotti, Cohen, Weiss & Simon, LLP, for the UAW.

21 MR. WERTHEIMER: Good morning, your Honor. William  
22 Wertheimer on behalf of the Flowers plaintiffs.

23 MS. PATEK: Good morning, your Honor. Barbara Patek  
24 of Erman, Teicher, Miller, Zucker & Friedman on behalf of the  
25 Detroit Public Safety Unions.

1 MS. CRITTENDON: Good morning, your Honor. Krystal  
2 Crittendon, interested party.

3 MS. BRIMER: Good morning, your Honor. Lynn M.  
4 Brimer appearing on behalf of the Retired Detroit Police  
5 Members Association.

6 MR. MORRIS: Good morning, your Honor. Thomas  
7 Morris of Silverman & Morris on behalf of the Retiree  
8 Association parties.

9 MR. GOLDBERG: Good morning, your Honor. Jerome  
10 Goldberg on behalf of interested party David Sole.

11 MR. TROY: Good morning, your Honor. Matthew Troy,  
12 Department of Justice, Civil Division, on behalf of the  
13 United States. It is not my intention to speak this morning,  
14 your Honor, unless you have specific questions regarding our  
15 filing from Friday.

16 THE COURT: Thank you, sir. Mr. Gordon.

17 MR. GORDON: Thank you, your Honor. I just wanted  
18 to provide the introduction relative to our proposed  
19 allocation of the time and order of presentation here this  
20 morning. As your Honor can see from the document that was  
21 filed, there are 11 objectors who wish to speak, and, of  
22 course, they all have important points to make, but -- and we  
23 very much appreciate the cooperation amongst all of them. It  
24 was a good and constructive process. Not only was that easy,  
25 but everyone has been very cooperative, and we've allocated

1 the time accordingly to various parties to have the  
2 opportunity to speak today.

3           You will note, your Honor, a couple things. One, we  
4 did not allocate the full 120 minutes in the morning.  
5 There's a few minutes left over. Similarly, in the afternoon  
6 there's about five minutes left over of the 90 minutes.  
7 That, of course, is not intended to necessarily waive our  
8 opportunity to have the full time, but we thought that would  
9 build in some flexibility and some error margin as people  
10 stand up and sit down to make sure that we fit within the  
11 time frame.

12           Also, as footnote one indicates, the presentation  
13 order does not necessarily tie -- correspond discretely with  
14 each of the issues as listed in your scheduling order, your  
15 Honor. There is some correlation, but various parties, as  
16 the Court, I'm sure, can understand, have a number of issues  
17 that they would like to address. There will be some overlap.  
18 The parties are going to try to overlap as little as  
19 possible, but it was not really feasible to try to identify  
20 discrete issues that each party was going to take on, so  
21 instead the hope is that as each party comes to the podium,  
22 they'll try to give you a little bit of a road map as to the  
23 particular issues that they're going to touch upon.

24           THE COURT: Thank you, and thank you for your  
25 extraordinary effort in coordinating this. I'm sure it was a

1 challenge. And I also want to thank all of the attorneys for  
2 cooperating with Mr. Gordon and with the Court in trying to  
3 organize this as best we can. So we're going to start then  
4 with AFSCME's counsel, and we're going to try to run the  
5 timing mechanism for your convenience. Kelli, have we got  
6 that available? I'm sorry.

7 MS. LEVINE: They were teasing me that if I'm  
8 nervous, it'll take 20 minutes, but if I remember to speak  
9 slowly, it'll take 35.

10 THE COURT: Okay. So for 35 minutes you may  
11 proceed.

12 MS. LEVINE: Thank you, your Honor. First, we  
13 appreciate the opportunity. We think these issues are  
14 extremely important, and we're glad that we have the  
15 opportunity to speak. Second, as Mr. Gordon correctly noted,  
16 the parties who are speaking here today have made a concerted  
17 effort to divide up the time and to try not to duplicate our  
18 comments, so in that regard we're reserving the right to rely  
19 on the filed objections along with the other arguments of  
20 other counsel simply because we won't have time to do it all  
21 ourselves.

22 With that, your Honor, we started this endeavor by  
23 looking at PA 436 specifically concerned, as you might  
24 imagine, with the pension issues and with the fact that we  
25 believe that the Michigan Constitution provides for

1 protections for vested pension benefits, and then that  
2 potentially conflicted with PA 436, and, therefore, we  
3 started looking at the issue of whether PA 436 was, in  
4 fact -- was, in fact, unconstitutional in that it allowed a  
5 Chapter 9 filing in light of the pensions -- in light of the  
6 pension restriction in the Constitution.

7 In addition to that, we were looking at the  
8 governor's authorization in allowing the Chapter 9 filing in  
9 light of PA 436 and in light of the Michigan Constitution and  
10 grappling with the issue of whether or not that authorization  
11 without any contingencies caused this Chapter 9 filing to be  
12 unconstitutional as applied.

13 In addition to that, we grappled with the ripeness  
14 issue as to whether or not all of these issues should be  
15 raised now or whether they should be raised in connection  
16 with a plan of adjustment, specifically, your Honor,  
17 grappling with the issue as it was presented to us by our  
18 members where we have folks literally sitting at their  
19 kitchen table deciding whether or not they can take medicine  
20 today or do they have to start taking it every other day, do  
21 they feed themselves, do they feed their children, do they  
22 pay rent, so we came to this Court anxious to have some of  
23 these issues decided quickly.

24 On top of that, as it turns out, involved in the  
25 mediations and the other efforts with regard to the serious

1 issues that are confronting Detroit, we do think  
2 understanding your Honor's views of the rules of the game  
3 could be useful for the parties in that process, but that's  
4 really by way of introduction because what we've done, your  
5 Honor, in addition to that, is we started researching how we  
6 thought PA 436 fit in the overall scheme of Chapter 9 and, in  
7 looking at those issues, delving into whether or not Chapter  
8 9 itself was, in fact, unconstitutional, which is what we  
9 will address before your Honor this morning. And I'd like  
10 to, with the Court's permission, set the table a little bit  
11 but promise to get into Bekins and some of the cases that are  
12 cited by folks who disagree with our views later on in the  
13 comments.

14           So I'd ask you, your Honor, to come back with me, if  
15 you will, to elementary and high school when we first started  
16 talking about what the Constitution is and what it means,  
17 and, respectfully, when we go back, we remember that the  
18 framers of the Constitution were fleeing an oppressive,  
19 overbearing, centralized government. So when we started  
20 looking at how we framed our Constitution, we were very  
21 careful to make sure that there was a federal Constitution  
22 that was extremely limited only to specific rights that we  
23 believed should transcend every single state in the union,  
24 and we've come to call those the unalienable rights, and they  
25 refer to things like freedom of speech and freedom of



1 religion. And under the Tenth Amendment, your Honor,  
 2 everything else is reserved for the states, so specifically  
 3 reserved for the states are the state municipal governments'  
 4 rights to handle their own financial management. And this is  
 5 done, your Honor, not to protect the states, which would have  
 6 been as suggested by the New Jersey plan, but was actually  
 7 done to protect the individual citizens, as suggested by the  
 8 Virginia plan, and the specific rationale behind protecting  
 9 the individual citizens was in order to have accountability  
 10 from our government and particularly, more importantly, from  
 11 our local governments, which were viewed as being more  
 12 accessible to the citizens that they were -- that they were  
 13 supposed to be taking care of. So, for example, if somebody  
 14 infringes on my right of free speech or my right of freedom  
 15 of religion, I know I point my finger to D.C., and I look at  
 16 the federal government, and I say to the federal government,  
 17 who is accountable for those federally protected rights,  
 18 "Make them stop," but if somebody says to me that there's an  
 19 inappropriate use of the power over the financial management  
 20 of a state municipality, of, for example, Detroit, I look to  
 21 my local government. I look to my local politicians and my  
 22 local leaders, and I say, "I'm holding you accountable," and  
 23 we saw that working well very recently with the mayor of  
 24 Detroit -- with the prior -- apologies -- prior mayor of  
 25 Detroit, so this direct accountability, which is a

1 cornerstone of how we -- of how we run our country and how we  
2 run this democracy, is there for a reason, and it's not there  
3 to protect the states. It's there to protect the citizens.  
4 The Constitution doesn't start "We the states." It doesn't  
5 say, "I the general federal government." It starts, "We the  
6 People." So now, as we indicated in our brief, we believe  
7 there is what we've called this unholy alliance between the  
8 state giving authorization to the federal government to run  
9 this Chapter 9 process. And what we said there, your Honor,  
10 is that the states are, in essence, ceding the responsibility  
11 and the accountability for their own financial management, so  
12 by turning over under Chapter 9 to the federal government and  
13 being able to hide behind the bankruptcy process and this  
14 Court, we lose that accountability that's a cornerstone of  
15 what our Constitution requires of us, and we've seen that  
16 already. We saw that debtor's counsel correctly noted in an  
17 internal e-mail exchange back in January of 2013 that making  
18 this a federal issue provides political cover, and we've seen  
19 it in the depositions where we're talking to the EM and the  
20 governor, and they are talking about the fact that they're  
21 not exactly sure what's going to happen with the pensions.  
22 The bankruptcy process takes care of that. And we would  
23 respectfully submit, your Honor, that we're seeing play out  
24 in real time and real life the exact loss of accountability  
25 that the Constitution was designed to protect, so --

1 THE COURT: Well, but hasn't state consent been a  
2 cornerstone of the Supreme Court's Tenth Amendment  
3 jurisprudence?

4 MS. LEVINE: Your Honor, we'll talk about the  
5 consent in Bekins, and we don't believe that what we're  
6 saying here today is inconsistent with state consent. And if  
7 your Honor will give me a little bit more leeway, we'll reach  
8 that point --

9 THE COURT: Sure.

10 MS. LEVINE: -- because we understand the issue. So  
11 one of the comments that's being made is that in order for  
12 there to be -- that the reason why we can't do it at the  
13 state level, the reason why the state municipal governments  
14 can't do it is because it violates the contract clause, and  
15 by violating the contract clause, you can't do a plan of  
16 adjustment unless you have a hundred percent consent.

17 Now, we would respectfully submit, your Honor, that  
18 there's two responses to that, and they are -- and I'll admit  
19 they're diametrically opposed, but under either response you  
20 don't get to the place where you get to take it away from the  
21 states. Number one, if you believe, as suggested, that you  
22 need a hundred percent consent at the state level because of  
23 the contract clause, then we would respectfully submit that  
24 the states can't cede control to the federal government and  
25 then suddenly it becomes legal to do a plan of adjustment

1 without a hundred percent consent. And, your Honor, in doing  
2 that, we're actually just reading from the Constitution  
3 itself. The contract clause is in Section 10 of Article I of  
4 the Constitution. Section 10, Article I, of the Constitution  
5 has three subsections, one, two, and three. In the first  
6 section, it talks about no state shall enter into treaties  
7 with foreign countries, print money, and it's the contract  
8 clause. Under sections two and three, not where the contract  
9 clause sits, it says, "No State shall without the consent of  
10 Congress," so by the plain reading of the Constitution, if  
11 "no state shall" means no state shall, then no state shall do  
12 it with or without the consent of Congress, and the framers  
13 clearly understood that if they wanted the states to be able  
14 to do it with the consent of Congress, they could have done  
15 what they did in the two other subsections and basically  
16 said, okay, instead we'll do it -- we'll do it with a federal  
17 municipal bankruptcy statute where the federal government  
18 will consent, and, therefore, you can violate the contract  
19 clause. So our first point is under the contract clause, "no  
20 state shall" means no state shall, and if we're going to be  
21 intellectually honest with ourselves, that applies regardless  
22 of whether or not Congress consents because it's not, as in  
23 Section 10, the second and the third paragraph, "No State  
24 shall without the consent of Congress."

25 THE COURT: What Supreme Court case law supports

1 this interpretation?

2 MS. LEVINE: Your Honor, we respectfully submit that  
3 it's Ashton.

4 THE COURT: The case that Bekins overruled?

5 MS. LEVINE: Well, we don't believe that Bekins  
6 overruled it, and if I can keep going, the alternative  
7 approach -- and, frankly, the plain meaning of the statute we  
8 don't believe yet -- or I'll admit we haven't found yet a  
9 constitutional case that comes right out and says it is or it  
10 isn't done this way, but it is the plain reading of the  
11 Constitution, which we thought was --

12 THE COURT: Okay.

13 MS. LEVINE: -- a good place to start. But moving  
14 past that, let's assume -- and we believe the better answer  
15 is that there has to be a way to adjust debts. Then we go  
16 back to where we started, your Honor, which is this is  
17 absolutely a state municipal right. What Bekins was looking  
18 at -- and remember Bekins was decided in -- right in the  
19 middle of the Great Depression. Okay. And so up until  
20 the -- up until just before Bekins was decided, there was no  
21 municipal federal bankruptcy law at all. It wasn't really  
22 contemplated by the framers, and I'll get into that a little  
23 bit more in a minute, but what Bekins found was we now have  
24 this new federal municipal bankruptcy law. There is no state  
25 counterpart, so the only option that's available to the state

1 and the only way that the state can be accountable to its  
2 citizens to fix this problem if there is no other option  
3 available is to then consent to the federal court stepping in  
4 and doing this. Consistent with that, your Honor, we  
5 believe, is Asbury Park, and we would respectfully submit  
6 that Asbury Park was decided after Bekins. It was decided --  
7 it wasn't a unanimous decision, but there was only one  
8 concurrence, so there was no dissent. It was drafted by  
9 Judge Frankfurter, hardly, you know, a slouch, and it  
10 specifically upheld Bekins but further found that a state --  
11 in that case, New Jersey -- could correctly under its state  
12 municipal authority do a plan of adjustment that did not  
13 require 100 percent of consent, and in dealing with this  
14 issue, it found that to be consistent with Bekins because  
15 Bekins was looking at a situation where there was no state  
16 alternative for the state to choose, and the state only had  
17 one alternative, and it made the alternative to rely on the  
18 federal statute. And it further found -- and I'm going to  
19 quote just for a moment, Judge, but in dealing with this  
20 issue, the Court posed and then answered this very question.  
21 "Can it be that a power that was not recognized until 1938,"  
22 which is a federal municipal bankruptcy law, "when so  
23 recognized, was carefully circumscribed to reserve full  
24 freedom" -- that's how Bekins interprets it -- "to the States  
25 has now been completely absorbed by the Federal Government -

1 that a State which, as in the case of New Jersey, has after  
 2 long study devised elaborate machinery for the autonomous  
 3 regulation of problems as peculiarly local as the fiscal  
 4 management of its own household, is powerless in this field?  
 5 We think not." And we think that's very telling, your Honor.  
 6 And by the way, Asbury Park is still good law. Like Bekins,  
 7 which it is consistent with, it has not been overruled, so  
 8 the -- then we were grappling with, well, why hasn't anybody  
 9 looked at this issue. What happened after Asbury Park was  
 10 that the Bankruptcy Act incorporated a federal municipal  
 11 bankruptcy statute, which is a predecessor to 903, which  
 12 specifically includes a provision that provides, like 903,  
 13 that no state can enter into a plan of adjustment unless  
 14 there is a hundred percent consent. We find that interesting  
 15 that it's the federal statute. Basically, that's Article --  
 16 that's Chapter 9 saying Chapter 9 is constitutional, and the  
 17 states can't enter into an alternate separate plan of  
 18 adjustment with less than a hundred percent because Chapter 9  
 19 says so. It's a circular argument, we would submit, your  
 20 Honor, that can't possibly be the reason why the states can't  
 21 enter into a plan of adjustment, especially in light of  
 22 Asbury Park, with less than a hundred percent consent.

23 In addition to that, the other telling conclusion in  
 24 Asbury Park was when they addressed head on the issue of the  
 25 contract clause, they determined that the contract clause is

1 not violated when you don't actually violate the underlying  
2 contract. They were analogizing it to like the property  
3 rights, so while you have a contract right and that can't go  
4 away or you have a property right and that can't go away,  
5 what they were talking about in Asbury Park was what's the  
6 remedy, and the remedy in a Chapter 9 -- and we would  
7 respectfully submit the remedy in a state -- appropriate  
8 state plan of adjustment is to take what is now a valueless  
9 right -- contract right because the state municipality is  
10 insolvent and create a plan of adjustment that, like in the  
11 corporate bankruptcy setting, creates value for a right that  
12 had no value. We're not doing away with the contract, and a  
13 lot of the cases that come after that -- for example, United  
14 Trust that talks about taking away the bonds or changing the  
15 bonds -- Asbury Park says you're not taking away the  
16 contract, you're not taking away the bonds, you're not taking  
17 away our retiree benefits. All you're doing is you're  
18 saying, "Look, there's not enough money here to pay for it.  
19 We can't get it through taxation. We need to -- we need to  
20 fashion a remedy." And that, your Honor, we would  
21 respectfully submit is consistent with Bekins, with Asbury  
22 Park, and with an appropriate reading of the contract clause.

23 Turning now to the bankruptcy clause, there is a --  
24 there is a provision that provides for a national bankruptcy  
25 statute. How can Chapter 9 be unconstitutional if we have



1 a -- if we have a bankruptcy clause that says there's a  
2 national uniform bankruptcy statute? Number one, we're  
3 directing our comments specifically at Chapter 9. We're not  
4 saying there is no statute that could be -- that could fit  
5 within the parameters. But that said, one of the things we  
6 would observe about the bankruptcy clause is when the framers  
7 framed the Constitution, it was inconceivable to them that  
8 there would be a national municipal bankruptcy law. To this  
9 day there is no national municipal bankruptcy law in the EU.  
10 And while Chapter 11 provides a very viable way to enable  
11 commerce and Chapter 7 provides a very viable way for there  
12 to be a fresh start -- and we've avoided debtor's prison and  
13 all of the things that the framers were focused on at the  
14 time -- there was no -- and there wasn't until the Great  
15 Depression a national municipal bankruptcy law.

16 Second, we think there's a problem with Chapter 9  
17 specifically because the requirement of the national  
18 bankruptcy law is that it be uniform, so whether I'm here in  
19 Detroit or in any other state or city in the country, I know  
20 what the -- I know what the criteria is to be a corporate  
21 debtor. It's right in the Code. I know what the criteria is  
22 to be a Chapter 7 debtor. It's right in the Code. But  
23 because Chapter 9 is struggling with the difference of the  
24 separation of what's a federal power and what's a state  
25 power -- and we respectfully submit struggling in a way that

1 didn't work -- Chapter 9 is not a uniform statute. There are  
2 some states that have objective standards so that everybody  
3 in their particular state has to meet a certain criteria in  
4 order to be a Chapter 9 debtor. There are some states that  
5 don't even have the ability to be a Chapter 9 debtor, and  
6 then there are some states, like Michigan, where even though  
7 there's a statute that purports to authorize Chapter 9  
8 filings, it is completely and totally subjective with regard  
9 to who qualifies, whether they get authorization to file, and  
10 whether or not there are any contingencies that are attached  
11 to what they do when they're in that filing.

12 THE COURT: Okay. So how do you distinguish the  
13 cases that uphold the nonuniformity of exemptions in Chapter  
14 7?

15 MS. LEVINE: Your Honor, one of the -- two responses  
16 to that. First of all, we understand the case law that says  
17 that you can have conformity in a geographic location, so we  
18 understand, for example, that if every state had an objective  
19 standard the way every state has its own exemptions in  
20 Chapter 7, that that could meet the criteria for uniform  
21 standards, but we're saying something different. In Chapter  
22 9 we don't know that every state has a standard or that  
23 they -- and if they don't have a -- and if they don't have a  
24 standard for becoming a Chapter 9 debtor, there is no default  
25 back to that which is provided under the Code. In other

1 words, in Chapter 7, if I like Detroit's exemptions, I use  
2 Detroit's exemptions. If I like the federal exemptions, I  
3 use the federal exemptions. But there is no place where I  
4 don't get to be a debtor or I don't get exemptions.

5 THE COURT: Well, but still the question remains how  
6 does a nonuniformity among states in authorizing or not  
7 authorizing Chapter 9 or in having different standards for  
8 seeking Chapter 9 protection make the federal law nonuniform?

9 MS. LEVINE: Well, your Honor, if you take that to  
10 its natural conclusion, you can say that I have a federal law  
11 that basically says you can do whatever you want, but because  
12 I'm saying you can do whatever you want to everybody, it's  
13 uniform. We would respectfully submit that that doesn't --

14 THE COURT: Isn't that just about what the Chapter 7  
15 exemption cases say? Beyond that, federal law outside of  
16 Chapter 9 applies state property law, generally speaking,  
17 and, of course, the property law differs from state to state  
18 to state.

19 MS. LEVINE: Yes. And that goes back to the line of  
20 cases that talk about geographic, that they can be -- that  
21 they can be uniform within a geographic area. The difference  
22 between all of those cases -- and then I'll let the point  
23 rest because you are the Judge, and we may have to agree to  
24 disagree --

25 THE COURT: I'm just asking questions.

1 MS. LEVINE: But the -- but we view that, as I said  
2 earlier, that those exemptions, those criteria are published.  
3 Okay. So even if I know that I'm not going to follow -- that  
4 if I'm going to follow state law with regard to UCC  
5 priorities or if I'm going to follow state law with regard to  
6 exemptions, in a specific geographic area I know exactly what  
7 that is. In the states that have the subjective test with  
8 regard to whether or not to file a Chapter 9, Detroit has a  
9 different standard than Lansing and has a different standard  
10 than other cities, and that's the issue, and the issue -- and  
11 not only that, but none of those cities know what that  
12 standard is. And I'll leave it there.

13 THE COURT: Okay.

14 MS. LEVINE: Your Honor, the other argument that's  
15 out there is, well, doesn't the state have -- doesn't the  
16 state have the ability to cede control if there's federal  
17 aid. Your Honor, we would respectfully submit that's a very  
18 different situation. If you're looking at a situation, for  
19 example, like Sandy or like Katrina where the federal  
20 government is saying we're going to give you money under  
21 specific terms and conditions, that's different. Nobody is  
22 saying to Detroit or nobody is saying to every single Chapter  
23 9 debtor if you file Chapter 9, you get "X" amount of money  
24 from the United States of America, and in exchange for that,  
25 you have to follow these certain rules. There's a difference

1 between entering into a contract for money and for support  
2 than ceding control just to do the plan of adjustment with no  
3 financial support.

4 THE COURT: Well, but the cases in which the Supreme  
5 Court has held the Tenth Amendment is violated by the federal  
6 government or the federal government's legislation involve  
7 what's called commandeering. Is there any of that here?

8 MS. LEVINE: Well, your Honor, we think that's -- we  
9 think that is, in part, what is happening here. The  
10 commandeering is they're taking away the state's right or  
11 the -- to do their own financial management.

12 THE COURT: But only because the state showed up.

13 MS. LEVINE: But that's not true, and this is where  
14 we go back to the Bekins --

15 THE COURT: Is there anything in Chapter 9 that  
16 compelled the state to authorize the city to file this case?

17 MS. LEVINE: Yes, and this is -- and this is where  
18 the argument comes. Okay. In Bekins there was no state  
19 alternative at all. In Asbury Park -- so, therefore, the  
20 Bekins Supreme Court made the decision that the state had no  
21 choice if it wanted to adjust its debt but to come to the --  
22 but to come to the federal court. In Asbury Park there was a  
23 state alternative to the federal statute that was -- and that  
24 was permitted by both the federal statute and the state  
25 statute, so the arguments outside of the federal statute that

1 said you can't go to federal -- you can't do it statewide,  
2 you have to go to federal court under the commerce clause and  
3 otherwise, were rejected for some of the reasons that we're  
4 discussing here today. In Chapter 9 four year -- or the  
5 predecessor to Chapter 9, four years after Asbury Park, the  
6 Bankruptcy Code in its municipal statute said we can adjust  
7 debts at the federal level if you use the Bankruptcy Act, now  
8 the Bankruptcy Code, but you, states, cannot because of how  
9 we read the commerce clause only -- state municipal  
10 governments cannot adjust debt except with a hundred percent  
11 consent, so what the -- so what Chapter 9 says to the  
12 governor is if you want to do a plan of adjustment without a  
13 hundred percent consent, you must come to the federal  
14 government, number one. Number two, your Honor --

15 THE COURT: Well, but the commandeering cases  
16 address situations where the state and -- the federal  
17 government imposes on the state to carry out some federal  
18 program, some federal policy. How does that work here? So,  
19 for example, in the New York case, which involved the waste,  
20 right, nuclear waste or whatever, the state was forced to  
21 take title to it under certain circumstances, and the Court  
22 held that the state couldn't be imposed upon to do that to  
23 carry out the federal policy of how to dispose of this waste.  
24 How is that analogous here?

25 MS. LEVINE: Well, your Honor, the reason why we

1 believe it's analogous is because in order to do a plan of  
 2 adjustment, arguably there's no other way to do that without  
 3 using Chapter 9 unless you have a hundred percent consent,  
 4 and that's the commandeering. The requirement that there be  
 5 a hundred percent consent unless you're the federal  
 6 government means that the state has no ability to do a plan  
 7 of adjustment unless it cedes control to the federal  
 8 government and to the bankruptcy process.

9 Your Honor, I'm coming up on time. If I -- unless  
 10 your Honor has more questions, if I could just close briefly.

11 THE COURT: Well, the other question I have for you  
 12 is what about the cases that hold that the lower courts are  
 13 to apply Supreme Court precedent until the Supreme Court  
 14 itself overrules it, and this is, of course, the Bekins case?

15 MS. LEVINE: Well, your Honor, our -- we would  
 16 respectfully submit that Asbury Park was decided after  
 17 Bekins. Right now where the Supreme Court sits is that  
 18 Bekins stands for the proposition that in the face of no  
 19 state alternative, which is what existed there, you can turn  
 20 to the federal statute. Asbury Park stands for the  
 21 proposition that side by side an appropriate municipal  
 22 bankruptcy law and an appropriate state law, that's where the  
 23 state gets to choose, and if the state, as it did in Asbury  
 24 Park, chooses an appropriate state law that does permit for  
 25 the adjustment of debt, then the state is accountable to its

1 citizens. If the state chooses the municipal law, then the  
2 state is accountable to its citizens. But either way, it's a  
3 true state decision. Consistent with both of those cases, we  
4 find ourselves here in Detroit with a situation where there  
5 is prohibited by Chapter 9, we believe unconstitutionally, no  
6 ability to have that second state decision.

7 THE COURT: Just so I understand, your argument is  
8 that the current Chapter 9 is different enough from Bekins  
9 because of its exclusivity that Bekins is not binding on this  
10 Court.

11 MS. LEVINE: Correct, and secondarily that Bekins  
12 never reached the issue because regardless of whether or not  
13 Bekins had an inappropriate -- the Bekins statute had an  
14 inappropriate clause, the state wasn't looking to have a  
15 separate -- you know, here we have PA 436 looking to try and  
16 pigeonhole itself into the strictures of Chapter 9 reviewing  
17 Chapter 9 as unconstitutional.

18 Your Honor, we believe your Honor is faced with a  
19 difficult decision here. We understand that Detroit is --  
20 all that's happening here is difficult. Detroit is in dire  
21 financial straits, and it's not lost on any of us that the  
22 decisions that you make with regard to the criteria for  
23 eligibility, particularly with regard to Chapter 9, will have  
24 implications for blighted cities throughout the United  
25 States. We also understand that constitutional issues are



1 difficult issues. We heard -- you know, we've been grappling  
2 since 9/11, for example, with the balancing between homeland  
3 security and individual privacy rights. We started talking  
4 earlier about the First Amendment, and as a society we  
5 grapple between where does First Amendment end and where does  
6 a hate crime, for example, begin. This is no less an  
7 important constitutional issue because of the impact this  
8 will have on state sovereignty and the ability of its  
9 citizens to hold its own municipal leaders accountable.

10           Your Honor spent a long time listening to a lot of  
11 individual objectors here in this courtroom talk about how  
12 bad they felt things were in Detroit trying to deal with the  
13 fact that their firemen were using garden hoses, you know,  
14 street lights are out, all of these things, and your Honor  
15 was clearly sympathetic. And it was -- and concluded that  
16 hearing, we believe correctly so, by saying that this was a  
17 great day for democracy, but we would also add, your Honor,  
18 that despite the fact that these things are at the forefront  
19 of your mind and you want to do what's right, that doesn't  
20 necessarily mean that you can do what's expeditious -- what's  
21 expedient. Democracy is hard, and we would respectfully ask  
22 that your Honor consider these issues with the same depth and  
23 consideration that you've considered everything in this case  
24 to date. Thank you.

25           THE COURT: Thank you. Mr. Montgomery also for 35

1 minutes.

2 MR. MONTGOMERY: Yes, sir. Thank you.

3 THE COURT: You may begin.

4 MR. MONTGOMERY: Good morning. Your Honor, my task  
5 today is to discuss with you constitutionality as applied,  
6 the standing and ripeness issue that the U.S. government has  
7 posed to our constitutionality as applied to argument, and to  
8 identify for you the predicate of that unconstitutionality as  
9 applied, which, of course, we believe is the unconstitutional  
10 behavior of Emergency Manager Orr and the governor in the  
11 context of PA 436.

12 I'd like to set the stage briefly for you, your  
13 Honor, on the question of standing by setting up two lines  
14 of -- view of history here. One is that in 1963 the State of  
15 Michigan amended its Constitution to protect the pensions of  
16 municipal workers. Partly in reliance on that protection, a  
17 small minority of the millions of people who have lived and  
18 worked in the city went to work directly for the city. Of  
19 those, thousands of people who worked, about 23,000 people  
20 are alive today who are retirees of the City of Detroit,  
21 their beneficiaries and surviving spouses.

22 Now, those 23,000 people have been, in our view,  
23 stalked by the emergency manager, who, with the blessing and  
24 support of his advisors, has proposed to eliminate pensions  
25 through a Chapter 9 process. On July 16th the emergency

1 manager sought permission from the governor to file a Chapter  
2 9. On July 18 the governor, with full knowledge of the plans  
3 of his emergency manager, gave unconditional permission to  
4 the emergency manager to file that Chapter 9 petition. And  
5 the first overt harm has, in fact, now been announced. On  
6 October 11, the city mailed its books to the retirees  
7 announcing the termination of the retiree health insurance  
8 program for those same 23,000 people.

9 Now, the committee that I represent, your Honor,  
10 consists of nine individuals, including retirees, deferred  
11 vested, retirement eligible, surviving spouses and  
12 beneficiaries, all of whom are protected by the pension  
13 clause, all of whom are adversely affected by the harm that  
14 was just announced by the city. Each has or represents  
15 vested accrued pension benefits, and they are participants in  
16 the city's retirement health system.

17 The retiree committee consists of creditors  
18 appointed by the U.S. Trustee to act in connection with the  
19 case under 1102 and we think, therefore, have standing under  
20 1109. Now, the 1109 standing of being an interested party  
21 may not be sufficient for either standing or ripeness on a  
22 constitutionality issue, but we say to you -- we ask your  
23 Honor to look at the current situation in the following  
24 analogy. When can somebody turn and defend themselves when  
25 they are being threatened with harm? We think that you don't

1 actually have to wait until the harm has befallen you if the  
2 threat is imminent, if the threat is capable of redress by  
3 the Court, and it is identifiable. The redress by the Court  
4 is, of course, denial of eligibility to the city. The threat  
5 is loss of pensions as announced by the emergency manager.

6 THE COURT: Of course, if eligibility is denied, the  
7 city is also denied its right to deal with all of its other  
8 debts, isn't it?

9 MR. MONTGOMERY: Your Honor, that may be a temporary  
10 delay because if your Honor holds that the current  
11 authorization papers are not constitutional or if accepted,  
12 despite their lack of constitutionality, the challenge to  
13 Chapter 9 becomes insurmountable, we think that the  
14 reasonable thing this Court could do if it were so inclined  
15 would be to deny the city its eligibility for the reasons of  
16 the challenge to the pension clause and then invite the city  
17 to come back with either a conditional acceptance by the  
18 governor or otherwise correct their manifest intent to  
19 violate Article IX, Section 24.

20 THE COURT: Well, what do I do if in Detroit two, as  
21 you propose, the bondholders come in waving the state  
22 contracts clause?

23 MR. MONTGOMERY: Well, your Honor, first, we think  
24 that there is a difference between Article IX, Section 24,  
25 and both the federal contracts impairments clause and the

1 state's own contracts impairment clause. We think that can  
 2 be found in two places. First, there are extra words that  
 3 can be found in Article IX, Section 24. In its entirety,  
 4 Article IX, Section 24, has a phrase that appears at the end,  
 5 which says "shall not be diminished or impaired thereby," the  
 6 entire phrase, if I may, your Honor, "The accrued financial  
 7 benefits of each pension plan and retirement system of the  
 8 state and its political subdivisions shall be a contractual  
 9 obligation thereof which shall not be diminished or impaired  
 10 thereby," and, of course, your Honor, the second funding  
 11 clause, which is, "Financial benefits arising on account of  
 12 service rendered in each fiscal year shall be funded during  
 13 such year and such funding shall not be used for financing  
 14 unfunded accrued liabilities." Your Honor, that is, to my  
 15 mind, certainly textually quite different than the state's  
 16 own simple contract impairment clause, and we think  
 17 meaningfully it's different. What Section -- Article IX,  
 18 Section 24, does for -- in our view, your Honor, is tell the  
 19 state that no matter what you are doing, you cannot take a  
 20 step to adversely affect those accrued financial benefits,  
 21 and we cite, of course, the Seitz case, which is the judicial  
 22 probate case in which judges in the State of Michigan asked  
 23 for protection of their pensions, and the Michigan Supreme  
 24 Court agreed. We think it's also consistent with the  
 25 Musselman case, which the Michigan Supreme Court said that,

1 again, the funding of retirement benefits that were otherwise  
2 protected or protectable had to be done, and the state could  
3 not take any action to not do that. Now, of course, that's a  
4 mandamus case in which the Court denied mandamus, but the  
5 legal proposition was squarely stated.

6 We also think the advisory opinions that the Court  
7 entered with respect to the tax exempt nature of retirement  
8 benefits clearly show that the Michigan Supreme Court looks  
9 to see if the state is doing something to impair the actual  
10 benefit. And that particular advisory opinion dealing with  
11 the tax exempt nature of retirement benefits, the Michigan  
12 Supreme Court said, no, merely taxing you or removing the  
13 special exemption is not an impairment of the financial  
14 benefit itself, so we step back and we ask your Honor to say,  
15 okay, is a plan proffered by the emergency manager with the  
16 knowledge and support or blessing of the governor authorized  
17 by a statute an unconstitutional series of events? Is the  
18 emergency manager's action unconstitutional, is the  
19 governor's action unconstitutional, or is the statute itself?  
20 Knowing that there is a judicial predilection for the  
21 narrowest possible reading of major problems, we submit to  
22 you that your Honor can start with the emergency manager's  
23 plan. Stop it. No eligibility if the emergency manager's  
24 plan is to be put forward. If that isn't enough because the  
25 governor authorized it, then you have to challenge the

1 governor.

2 THE COURT: Let me rewind the clock here just --

3 MR. MONTGOMERY: Sure.

4 THE COURT: -- a couple of minutes and ask you about  
5 this nonimpairment provision in the Constitution. The  
6 question we all are struggling with is what is the meaning,  
7 the substantive meaning of that provision in the context of a  
8 political subdivision that doesn't have the money to comply  
9 with it? What's the meaning of it?

10 MR. MONTGOMERY: First, I think this might be a good  
11 opportunity to agree with your Honor that impairment in the  
12 classic sense is something the Bankruptcy Code, of course,  
13 has dealt with for many years by saying the allocation of  
14 assets is not all by itself impairment. I think we -- I  
15 think it's fairly well established that just because a  
16 creditor gets less than a hundred cents does not mean that  
17 their contract is impaired. On the other hand --

18 THE COURT: I thought that's exactly what it meant.

19 MR. MONTGOMERY: That's if the state does it, but  
20 that's not that the -- remember the -- it was not a taking of  
21 property by the federal government to authorize the  
22 Bankruptcy Code. It was --

23 THE COURT: Oh, if that's what you mean --

24 MR. MONTGOMERY: Yes.

25 THE COURT: Absolutely.

1 MR. MONTGOMERY: Totally.

2 THE COURT: Absolutely, sure.

3 MR. MONTGOMERY: But it is a taking of property if  
4 the emergency manager says to its retirees, "I, either by  
5 virtue of a plan I put in or otherwise, am taking your right  
6 to receive pension benefits in the future," which is what he  
7 is proposing. He is not merely proposing to alter the  
8 funding system in violation of Article IX, Section 24. He is  
9 proposing to actually eliminate or reduce already accrued  
10 financial benefits.

11 THE COURT: Right, so what's -- how do we give  
12 meaning to nonimpairment, as you propose is constitutionally  
13 required, if the city doesn't have the money to pay? What  
14 does it -- what's the meaning of that requirement?

15 MR. MONTGOMERY: Well, your Honor, I think that if  
16 there is to be some allocation -- let's back up for half a  
17 moment. Let us assume for the moment that, in fact, the city  
18 has proposed to utilize all of its assets to deal with it, so  
19 we're not talking about a situation in which the city has  
20 capacity on its balance sheet or cash flows to deal with  
21 something that it just refuses to do. We think that the  
22 proper answer is not for the federal government to invite the  
23 state to violate its own Constitution but to have the state  
24 adjust its own laws, have the state, using its people, its  
25 either constitutional ratification process or the state



1 through its legislative process create the system for  
2 adjustments that Asbury Park tells us is still at least  
3 viable. Putting that aside, whether or not Asbury Park is or  
4 is not still --

5 THE COURT: Well, but hang on, Mr. Montgomery. If  
6 the pension right is as inviolate as you say it is, the  
7 legislature can't adjust the pensions either.

8 MR. MONTGOMERY: No, but it can adjust other  
9 people's assets, other people's entitlements. It can make  
10 the accommodations to its Constitution that may be required.  
11 It has the capacity to levy. It has the capacity to change  
12 property rights. The state legislature has those property --  
13 and the only thing we are asking this Court to consider --

14 THE COURT: Well, let me ask this question then.

15 MR. MONTGOMERY: Yes, sir.

16 THE COURT: Is it your position that because of this  
17 nonimpairment requirement in the Michigan Constitution, the  
18 State of Michigan is a guarantor of retirees' pension rights?

19 MR. MONTGOMERY: We have not garnered nor do we  
20 propose to express a view today whether or not the state is a  
21 guarantor. What we are proposing to express a view today is  
22 that no state actor can do something in violation of the  
23 state Constitution and have that act be other than void ab  
24 initio. And if those acts are void ab initio, the requisite  
25 authorizations either don't exist or, if this Court has the

1 power to accept those authorizations notwithstanding their  
2 unconstitutionality under Michigan law, then your Honor is  
3 engaged not in aiding the sovereignty of the state, as  
4 suggested was required by Bekins, but you are aiding -- you  
5 are going in the direction of derogation of the sovereignty  
6 of the state. And why do I say that? Because you are  
7 telling the people of Michigan they can't control their own  
8 Constitution, they can't control their own legislature, they  
9 can't control their own executive officers, and we think that  
10 is a pure Tenth Amendment problem.

11           You mentioned earlier in discussion with Ms. Levine  
12 the commandeering issue. It is absolutely true, as you have  
13 identified, that first states must act in aid, not in  
14 derogation of sovereignty. That's the Bekins. Under Printz  
15 they can't compel a state official to do something that is  
16 otherwise the subject of a federal program. They can invite,  
17 they can entice, but they can't commandeer. That's the  
18 Printz -- that's the Brady Bill decision. And in the New  
19 York versus United States case, which, again, your Honor  
20 identified, you can't compel ownership of radioactive waste.  
21 Again, you can create programs, you can create enticements,  
22 you can create an exhaustive federal regulatory scheme that  
23 keeps the states out of regulating the business, but here the  
24 federal government can't, by virtue of the Tenth Amendment,  
25 keep the states out of regulating the financial obligations

1 of its citizens. It can't keep the states out of the  
2 business of deciding when their elected officials can or  
3 cannot do something, and it is that issue that causes the as  
4 applied problem as opposed to the facial and validity issues  
5 that were raised by AFSCME in the arguments of Ms. Levine.  
6 We think it --

7 THE COURT: I want to -- well, I want you to focus  
8 on why the mere filing of this case resulted in an imminent  
9 threat to the pension rights of the retirees of the city  
10 because the filing itself didn't result in anyone's payments  
11 being reduced; right?

12 MR. MONTGOMERY: Well, I will note for you they --  
13 on the healthcare side, they apparently are.

14 THE COURT: Well, but that's not a result of the  
15 Chapter 9.

16 MR. MONTGOMERY: Well, actually, I don't think that  
17 could be done under state law because these are all  
18 collectively bargained -- or mostly collectively bargained,  
19 and to the extent they were collectively bargained,  
20 they're --

21 THE COURT: Well, but with or without the Chapter 9,  
22 Mr. Orr was free to do that or not under state law.

23 MR. MONTGOMERY: Or not under state law.

24 THE COURT: There's nothing about Chapter 9 that  
25 impacts his decision to do that. He hasn't asked, at least

1 as far as I know, the Court's permission to do that.

2 MR. MONTGOMERY: No. As far as we know, he hasn't  
3 asked either. So if I may answer the question, which, if I  
4 understood it correctly, was why is the mere filing --

5 THE COURT: An imminent injury.

6 MR. MONTGOMERY: -- an imminent threat, first, I go  
7 back to the factual predicate that I think underlays this,  
8 that the mere threat of filing -- excuse me -- the mere  
9 threat of a filing is not the harm all by itself, but it was  
10 preceded by an announced plan, the June 14 proposal, and a  
11 series of other events that the emergency manager undertook  
12 and statements made, which evidenced -- evidenced -- a desire  
13 to violate the state Constitution. Now, the only way in the  
14 emergency manager's own mind that he can do that is if he has  
15 access to the Bankruptcy Court because he believes it will  
16 trump the state constitution with respect to pension  
17 protections. Now, right or wrong, it is the -- it is the  
18 threat that those pension benefits will be eliminated as part  
19 of a plan, a series of steps of which have already been  
20 undertaken, the most recent of which was the filing of the  
21 Chapter 9 petition. The problem we face, at least in my  
22 view, your Honor, is that the world that you face today for  
23 deciding whether or not the emergency manager's actions are  
24 or are not constitutional under Michigan law is different in  
25 the eligibility context than we think you're going to be

1     faced with at a plan confirmation context. Once you're  
2     inside the box of bankruptcy -- excuse me -- everyone,  
3     putting aside whether -- how vigorously we will try to get  
4     state law to say something different, but everyone seems to  
5     suggest that the priority schemes and the allocation schemes  
6     of the Bankruptcy Code preclude a contrary result that would  
7     be allowable under state law.

8             THE COURT: Oh, but you're going to fight that.

9             MR. MONTGOMERY: But, your Honor, I've lost before,  
10     and I might lose again. The issue of --

11            THE COURT: Well, but if you lose, it will be on  
12     legal grounds.

13            MR. MONTGOMERY: But, your Honor, it will be. If we  
14     are fighting this issue at the back end of the case and we  
15     are arguing, as we will if we are required to, that  
16     notwithstanding 109, that the emergency manager can't propose  
17     a plan in good faith in which he violates his constitutional  
18     rights for --

19            THE COURT: Constitutional obligations, yeah.

20            MR. MONTGOMERY: Constitutional obligations. I  
21     apologize. For that to be a viable argument, in effect, you  
22     have to rule today, your Honor, that it would be a violation  
23     of his constitutional obligations because if it's not a  
24     violation in the context of adhering to the Bankruptcy Code  
25     provisions, which some cases say only provide with respect to

1 prospective obligations -- that is, a new pension plan would  
2 be subject to the protections -- well, we're not talking  
3 about a new pension plan, your Honor. We're talking about  
4 one that's been around for 60 or 70 years now, and we're  
5 talking about a retirement plan that has people who are a  
6 hundred years old.

7 THE COURT: Suppose the plan is confirmable because  
8 it results in the consent of those impaired after  
9 negotiation.

10 MR. MONTGOMERY: Your Honor, if our understanding of  
11 the law is correct, it's going to be very hard for a state  
12 official to agree in good faith to propose a plan that  
13 impairs financial benefits without a hundred percent of the  
14 retirees consenting either under 109 or under state law, and  
15 so the -- in order to get to the point where a less than 100-  
16 percent majority of the retirees are accepting the plan, you  
17 have to have decided that state law doesn't control the  
18 exercise of those rights.

19 THE COURT: Suppose you or one of your objecting  
20 colleagues decides to assert that the Michigan Constitution  
21 requires the state to guarantee the federal -- the retirees'  
22 pension.

23 MR. MONTGOMERY: Well, your Honor, the -- again, you  
24 are asking for advisory hypotheticals here, but --

25 THE COURT: Well, but that's what looking at

1 ripeness is all about.

2 MR. MONTGOMERY: The issue will be then not whether  
3 or not the bankruptcy process has harmed the retirees because  
4 it will have -- if the state is a guarantor or arguably a  
5 guarantor, it must be sued, query whether or not that lawsuit  
6 can be brought in the Bankruptcy Court or some other place,  
7 and, secondly, the -- under the Sittler case, I believe,  
8 there is a question of whether or not there's a cause of  
9 action for damages for unconstitutional behavior. There may  
10 be a remedy, an injunction against unconstitutional behavior,  
11 but the Michigan Supreme Court has not yet adopted a per se  
12 rule that says if there is a violation of the state  
13 Constitution --

14 THE COURT: Suppose the state agrees that the  
15 Constitution obligates it to guarantee the city's pension  
16 obligations.

17 MR. MONTGOMERY: Then the state will have remedied  
18 the harm caused by the bankruptcy, your Honor, but the harm  
19 was still being caused by the bankruptcy.

20 THE COURT: What harm?

21 MR. MONTGOMERY: The harm was the diminution of  
22 pension benefits.

23 THE COURT: Well, but if the state backs it up,  
24 there's no diminution.

25 MR. MONTGOMERY: Yeah. If, as part of a plan of

1 arrangement, the state backstops -- you're right, your  
2 Honor -- then the -- this is like a situation --

3 THE COURT: Okay. Okay. If I'm right about that,  
4 then why is the issue ripe now as opposed to then?

5 MR. MONTGOMERY: This is like the landlord case, if  
6 I may, your Honor, in which the -- I think it's Bennett  
7 versus City of San Jose, which, if I may, your Honor, since  
8 we didn't brief this issue, I can give you the cite for, but  
9 as I'm looking for the citation, I believe that case stands  
10 for the proposition that a landlord need not await the actual  
11 failure to collect more rent than he could under the new  
12 ordinance. He's allowed to challenge the ordinance when it's  
13 being passed. All right. We think this situation is very  
14 similar to that. We have a situation in which the emergency  
15 manager has undertaken an act, has sought the aid of this  
16 Court, and the question is do we have to wait for this Court  
17 to, in effect, put it to us before --

18 THE COURT: No, no. The question isn't that. The  
19 question is do you have to wait for the emergency manager to  
20 actually propose a plan that impairs pensions -- that's the  
21 question -- and then object to that on constitutional  
22 grounds.

23 MR. MONTGOMERY: In the Thomas More Law Center case,  
24 your Honor, the -- which is the commerce clause challenge to  
25 minimum coverage provisions under the Affordable Care Act,



1 three and a half years in advance, the Sixth Circuit found  
2 standing because notwithstanding the fact that it was a long  
3 way off and many things could occur, including Congress  
4 changing the law, different rules being applied, that was  
5 enough because there was nothing the party asserting the  
6 claim had to do in order to become injured. Now, yes, there  
7 were things that any member of the law center group could do  
8 that could escape the harm, but the fact that they had to  
9 undertake affirmative steps to escape the harm was enough.

10 Here the only thing we can do to escape the harm  
11 which the emergency manager has announced he will undertake  
12 is to escape, and the only way to escape is through the gates  
13 that your Honor is standing at the door of. You are the  
14 keeper of the protection for the retirees. You are the one  
15 who can stop the emergency manager from doing what is  
16 unconstitutional under Michigan law. And apparently, by the  
17 way, both the state and the city are inviting you to rule on  
18 constitutionality issues, you know. They are perfectly  
19 comfortable with your going down that road, your Honor, and  
20 notwithstanding our hesitancy --

21 THE COURT: Does that make an otherwise not ripe  
22 issue ripe?

23 MR. MONTGOMERY: No, obviously not, your Honor, but  
24 we do think that where there's -- where the voluntary  
25 cessation by the city or the temporary cessation or the

1 temporary abandonment of its statements that, oh, we are  
2 going to impair the pensions does not create a situation that  
3 moots the controversy nor do we think it eliminates the  
4 ripeness of the controversy because your Honor can still see  
5 the identifiable harm and can still issue an order that  
6 redresses that identifiable harm by telling the city it may  
7 not enter the portals of your courtroom.

8 Now, your Honor, I think we have, in effect,  
9 distinguished the Barnwell case, which is cited by, I  
10 believe, the U.S. government, because that was an ad hoc  
11 committee of citizens instead of an 1102 committee. Here  
12 we're clearly creditors. Here 1109 grants us statutory  
13 standing as parties of interest, and I think we have  
14 indicated to you that the harm is factual, imminent, and you  
15 are at the gates.

16 One other thing I might want to sort of identify in  
17 this ripeness issue, why now as opposed to what, why later,  
18 of course, your Honor is familiar with the City of Stockton  
19 case, and we are not urging you to adopt that case obviously,  
20 but it does suggest that once in Chapter 11, the State of  
21 California couldn't decide which rules it was going to  
22 follow.

23 THE COURT: Chapter 9?

24 MR. MONTGOMERY: Right, in Chapter 9, the same thing  
25 your Honor might decide here; that is, once inside Chapter 9,

1 the city is not free to do whatever it wants to do except  
 2 with respect to its own property and its own future  
 3 governance. That you cannot touch in any way, shape, or  
 4 form, but that doesn't mean that you have to approve a plan  
 5 that violates what your Honor thinks are the rules of the  
 6 road. And it is that danger that you would be called upon to  
 7 make a ruling inconsistent with Michigan law at the back end  
 8 of the case that has us asking you at the front end of the  
 9 case to prevent the city from engaging in that dialogue.

10 Now, the -- I think worth making as a final, if you  
 11 will, point -- and, again, later this afternoon you will hear  
 12 a more fulsome discussion, I believe, on all of the issues  
 13 associated with PA 436, but I think the void ab initio issue  
 14 is important to our constitutionality position; that is, were  
 15 it not for the fact that under Michigan law an  
 16 unconstitutional act is considered void ab initio, we think  
 17 you might be able to go down the road of accepting the  
 18 authorization papers as having been legitimately delivered to  
 19 your Honor without fear of violating our view of how Chapter  
 20 9 would be unconstitutional as applied; that is, if Michigan  
 21 law did not regard unconstitutional acts as void ab initio,  
 22 then all you would be faced with is a remediable situation  
 23 rather than an absence of action or an absence of  
 24 authorization action. And with respect to the void ab initio  
 25 cases, we have cited those in our brief, your Honor, and we

1 think that you should accept as a truism, if you will, the  
 2 simple words actually uttered by Attorney General Schuette in  
 3 his paper that the city lacks authority under Michigan law to  
 4 propose a plan that diminishes accrued pension rights. It  
 5 similarly lacks power to consent to any proposed action that  
 6 would violate the Michigan Constitution. The proposed action  
 7 was the petition. The proposed action was the petition as  
 8 part of a plan to eliminate the pension rights induced -- the  
 9 emergency manager got the governor to say yes to an act that  
 10 was unquestionably contrary to the pension clause. As a void  
 11 ab initio act, that means that the legitimacy of the filing  
 12 is called into question, pure question of state law for your  
 13 Honor to rule upon, pure question of whether or not, in fact,  
 14 the city has obtained valid authorization papers -- pretty  
 15 hard to be valid if the underlying actions are void ab  
 16 initio, which is the norm under Michigan law, and we think,  
 17 therefore, your Honor has two ways to go down the path of  
 18 blocking eligibility independently of the factual disputes  
 19 under 109. One is to hold that it's unconstitutional, the  
 20 authorization was unconstitutional because it was part of a  
 21 scheme to eliminate the pension rights or to say even if it  
 22 wasn't void ab initio, the acceptance of those actions by  
 23 this Court raise a huge constitutional challenge under the  
 24 Tenth Amendment to Chapter 9 itself. Obviously the principle  
 25 of limiting federal constitutionality challenges would favor

1 finding that the narrower ground would be that the emergency  
 2 manager couldn't have filed his papers. And I think, your  
 3 Honor, just because I must, I just want to argue we are not  
 4 arguing -- we are not rearguing today all those issues which  
 5 we were in front of your Honor before several weeks ago about  
 6 Stern v. Marshall and whether or not the Court should do  
 7 that. We are in front of you. You have determined that you  
 8 have the power to decide issues of state and federal  
 9 constitutionality. We are asking you to exercise that power  
 10 and to preclude the city's eligibility.

11 THE COURT: So if you don't -- we have a little time  
 12 left. I have some more questions for you.

13 MR. MONTGOMERY: Sure. Happy to engage, your Honor.

14 THE COURT: One is sort of a procedural one. You  
 15 mentioned that you didn't brief the ripeness issue. Would  
 16 you like an opportunity to do that?

17 MR. MONTGOMERY: That would be fine, your Honor.

18 THE COURT: I'd leave it to your discretion.

19 MR. MONTGOMERY: Yes, yes.

20 THE COURT: How much time --

21 MR. MONTGOMERY: We'd be happy to do that, your  
 22 Honor.

23 THE COURT: How much time would you like?

24 MR. MONTGOMERY: Give us a week, your Honor.

25 THE COURT: Okay. You have a --

1 MR. MONTGOMERY: Yeah. Give us a week. It'll be --  
 2 if you don't mind, we'll submit it to you on the first day of  
 3 the trial.

4 THE COURT: Okay. I want to ask you about a couple  
 5 of entries in the brief that you did file.

6 MR. MONTGOMERY: Okay.

7 THE COURT: On page 27, you say -- and I want to  
 8 quote here. This is the brief you filed at Docket Number  
 9 805.

10 MR. MONTGOMERY: Yes.

11 THE COURT: You say, "As noted by the Sixth Circuit  
 12 in City of Pontiac Retired Employees Association, 213 Westlaw  
 13 4038528 at \*1-2, the Michigan legislature evidenced an  
 14 unconstitutional, and undemocratic purpose in crafting PA  
 15 436," close quote. Similarly, on page 29 of that brief you  
 16 say, "The Michigan legislature, the Governor, and the  
 17 Emergency Manager have each made clear that abrogation of  
 18 municipal retirement compensation rights was the legislative  
 19 intent of the Act," referring to PA 436, "and is a central  
 20 purpose of this bankruptcy. That intent also was recently  
 21 recognized by the 6th Circuit in City of Pontiac Retired  
 22 Employees Association," same cite at \*3. I have to say, Mr.  
 23 Montgomery, that I have studied that opinion by the Sixth  
 24 Circuit several times, and I cannot find these references. I  
 25 cannot find where the Sixth Circuit addressed or even

1 suggested anything about the constitutionality of PA 436. Am  
2 I missing something or was this a mistake?

3 MR. MONTGOMERY: Well, unless my memory fails me,  
4 your Honor, I think what we're referring to is the fact that  
5 the Sixth Circuit said that PA 4, which was the immediate  
6 predecessor of 436, had each of those purposes, your Honor,  
7 and that, therefore, by extension --

8 THE COURT: Perhaps so, but the Court didn't say  
9 anything about PA 436.

10 MR. MONTGOMERY: Well, other than that it was  
11 adopted despite the fact that the referendum had overruled PA  
12 4 and that it was virtually the same but for -- I believe the  
13 phrase was an add-on for --

14 THE COURT: The Sixth Circuit did not say anything  
15 about the purpose or intent of PA 436.

16 MR. MONTGOMERY: But it did as to 4, your Honor.

17 THE COURT: It did.

18 MR. MONTGOMERY: And it says 4 -- 436 is the same as  
19 4. That's how we got there. Rightly or wrongly, that is how  
20 we got there, your Honor. We say if the Sixth Circuit  
21 identified a purpose of PA 4 as being the impairment of  
22 pension --

23 THE COURT: Well, since you're going to file an  
24 amended brief --

25 MR. MONTGOMERY: Yes, sir.

1 THE COURT: -- I want you to tell me very  
2 specifically where in this City of Pontiac case the Court  
3 said anything or suggested anything about the  
4 constitutionality of PA 436.

5 MR. MONTGOMERY: All right. Your Honor, we will --

6 THE COURT: I agree with you it addressed it at  
7 length with regard to PA 4 and expressed grave concerns about  
8 it, but that's not the act before this Court today, so I  
9 invite you to do that in your --

10 MR. MONTGOMERY: Of course.

11 THE COURT: -- new brief.

12 MR. MONTGOMERY: We'll add that discussion to our  
13 ripeness supplemental brief.

14 THE COURT: All right. Thank you.

15 MR. MONTGOMERY: Thank you, your Honor.

16 THE COURT: Ms. Brimer, you may proceed for ten  
17 minutes, please.

18 MS. BRIMER: Thank you, your Honor. Lynn M. Brimer  
19 appearing on behalf of the Retired Detroit Police Members  
20 Association. Your Honor, your concluding arguments or  
21 discussion with Mr. Montgomery leads directly into the  
22 discussion that I will have with you this morning, and that  
23 has to do with the constitutionality of PA 436 under the  
24 Michigan Constitution, your Honor. And first and foremost,  
25 your Honor, I'd like to point out that in our brief we



1 noted -- and we cited the Schimmel case -- we noted that PA  
2 436 was passed in what we believe is derogation of the  
3 Michigan referendum provision in Article II, Section 9, of  
4 the Michigan Constitution. It is well worth noting at the  
5 outset of this discussion, your Honor, that that issue was  
6 not addressed by either the city or the State of Michigan in  
7 the pleadings they have filed.

8           With that, your Honor -- and I'll address that a bit  
9 briefly later, your Honor. Article I, Section 1, of the  
10 Michigan Constitution specifically provides that, "All  
11 political power is inherent in the people. Government is  
12 instituted for their equal benefit, security and protection."  
13 Consistent with that maxim, Article II, Section 9, of the  
14 Constitution specifically provides -- and it's a lengthy  
15 provision, your Honor, so I'll read the relevant  
16 provisions -- "The people reserve to themselves the power to  
17 propose laws and to enact and reject laws, called the  
18 initiative, and the power to approve or reject laws enacted  
19 by the legislature, called the referendum. The power of the  
20 referendum does not extend to acts making appropriations for  
21 state institutions or to meet deficiencies in state funds."  
22 As has been noted, your Honor, in a handful of cases that we  
23 can find that address this case, this provision of referendum  
24 is so significant and vital to our Constitution that Article  
25 II, Section 9, further provides that, "No law as to which the

1 power of referendum properly has been invoked shall be  
2 effective thereafter unless approved by a majority of the  
3 electors voting thereon at the next general election."

4 As this Court is aware, I'm sure, on November 6,  
5 2012, by referendum, the people of the State of Michigan  
6 rejected Public Act 4 on a vote of 52 to 48 percent. That  
7 was the Local Government and School District Act --  
8 Accountability Act. On December 26, Governor Snyder approved  
9 Public Act 436, the Local Financial Stability and Choice Act,  
10 a virtually identical law to Public Act 4.

11 In order to avoid subjecting Public Act 436 to  
12 referendum, two very minor spending provisions were tacked on  
13 at the back end. Section 34 of the Act provides that for the  
14 fiscal year ending 9-30, 2013, \$780,000 is appropriated to  
15 administer the Act, in essence, to pay the salaries of the  
16 emergency managers appointed thereunder, and Section 35  
17 provides that \$5 million is appropriated for the same time  
18 frame for the professionals such as lawyers and financial  
19 consultants that are engaged under the Act. The spending  
20 provision was not at all a general spending provision for the  
21 State of Michigan but a very limited provision relating  
22 directly to the Act.

23 We have researched, your Honor, and cannot find a  
24 single instance where the voters of Michigan have  
25 specifically rejected a law and shortly thereafter the

1 governor passes a very similar law, if not identical, and  
 2 tacked on a spending provision in an effort to remove it from  
 3 the otherwise democratic process of the State of Michigan.

4           There are a handful of cases in Michigan that do  
 5 address the referendum. In the case of Kuhn v. Department of  
 6 Treasury at 384 Mich. 378, 1971, the Michigan Supreme Court  
 7 specifically provided or held that the phrase in the preamble  
 8 of that -- the Income Tax Act of 1967, which provides that  
 9 the Act is for the purpose of meeting deficiencies in state  
 10 funds was not, in fact, sufficient when at the time the state  
 11 did not have any state deficiencies in its funding, and,  
 12 therefore, that provision in the preamble did not, in fact,  
 13 remove the Income Tax Act of 1967 from the power of  
 14 referendum. Unfortunately, in that case the plaintiff had  
 15 not complied with the requirements for referring the matter  
 16 to the -- or the law to the referendum, and so the Court was  
 17 not able to render any further opinion regarding that  
 18 language and its impact on the -- whether or not that case  
 19 had -- that law had it been brought to referendum. However,  
 20 it's instructive to this Court. The law at issue in that  
 21 case had not previously been rejected on referendum, so,  
 22 therefore, it does have some influence in how this Court  
 23 should interpret how the Michigan Supreme Court may view the  
 24 two spending provisions tacked onto Public Act 436. Public  
 25 Act 4 had, in fact, been rejected by the state through a

1 proper referendum. The spending provisions were added on in  
 2 an effort to remove the case -- the law from the referendum  
 3 in derogation of the provision in Article II, Section 9,  
 4 which provides specifically that no law to which the power of  
 5 referendum had been properly applied shall be effective  
 6 thereafter unless approved by a majority of the electors  
 7 voting thereon at the next general election.

8 THE COURT: Okay. So I have this question for you  
 9 regarding this argument, and it's, again, a ripeness question  
 10 and a standing question. How does any party have standing to  
 11 challenge the constitutionality of PA 436 on this ground or  
 12 why is it ripe until such a party has complied with all of  
 13 the legal requirements to have a referendum regarding that  
 14 put on the ballot and it being rejected because the law isn't  
 15 subject to a referendum because of this appropriations  
 16 provision?

17 MS. BRIMER: I don't believe, your Honor, that by  
 18 adding on the spending provision, which on its face took  
 19 Public Act 436 out of the referendum provision of the  
 20 statute -- if that is the case, your Honor, then you have  
 21 read out the referendum from the Michigan Constitution. I  
 22 think this is precisely the mechanism by which the  
 23 constitutionality of the law now should be challenged. When  
 24 that law was then relied upon for purposes of the appointment  
 25 of an emergency manager, that is precisely, I believe, your

1 Honor, how this would come to a court for review. On its  
2 face, the governor attempted to remove this from the  
3 referendum. It was removed from the referendum, but you  
4 can't read that out of the law and read out of the  
5 Constitution the second provision, which requires that any  
6 law that has been rejected by referendum be resubmitted to  
7 the electorate.

8 I see I'm running out of time, your Honor. What I  
9 would like to note, your Honor, is that while you are correct  
10 that the Sixth Circuit did not specifically rule on 436 --  
11 I've read that case closely several times -- 436 was not  
12 before the Court, and, as you'll recall, some of the matters  
13 at issue in that case were what precisely is before the Court  
14 because some of the arguments had not even been preserved on  
15 appeal. However, I think the tone of the Sixth Circuit when  
16 it said, "Apparently unaffected that voters had just rejected  
17 Public Act 4, the Michigan Legislature enacted, and the  
18 Michigan governor signed, Public Act 436. Act 436 largely  
19 reenacted the provisions of Public Act 4, the law the  
20 Michigan citizens had just revoked. In enacting 436, the  
21 Michigan Legislature included a minor appropriations  
22 provision, apparently" -- they didn't say "in fact," but  
23 "apparently to stop Michigan voters from putting Public Act  
24 436 to a referendum." I think that gives us a tone, and I  
25 also think it's noteworthy, your Honor, that despite the fact

1 that the city noted on page 15 of Exhibit A to their  
2 consolidated response to the objections that we had raised  
3 this specific issue, it is not addressed. It is not  
4 responded to by either the state or the city. It stands  
5 unrefuted at this point, your Honor.

6 THE COURT: Thank you.

7 MR. GOLDBERG: Good morning, your Honor. Jerome  
8 Goldberg appearing on behalf of interested party David Sole,  
9 who is a city retiree, as is his wife, Joyce Sole.

10 THE COURT: And you may proceed for ten minutes,  
11 sir.

12 MR. GOLDBERG: Thank you, your Honor. While I  
13 certainly concur with many of the eloquent arguments put  
14 forth by counsel prior to myself, I want to approach the  
15 issue from a somewhat narrower point of view from the prism  
16 of Michigan state law and specifically from the Michigan --  
17 how Michigan state law views the issue of statutory  
18 construction.

19 As we know, 11 U.S.C. 109 states that a local  
20 municipality must be specifically authorized by state law to  
21 file a Chapter 9 bankruptcy. The phrase "authorized by law"  
22 refers to the law of the state, and I cited Bekins for that  
23 principle. States act as gatekeepers to their municipalities  
24 and access to relief under the Bankruptcy Code.

25 As we all know, the basis for the state law

1 authorizing the filing of this Chapter 9 is Public Act 436,  
 2 and Public Act 436 has several different provisions that I  
 3 think it's worth looking at to get an understanding for why  
 4 we believe the failure to include a contingency to bar the  
 5 impairment of pensions is violative of state law. It  
 6 provides the emergency -- Section 1551(c) provides the  
 7 emergency manager with the power to carry out the  
 8 modification, rejection, termination, and renegotiation of  
 9 contracts. Section 1552 provides the emergency manager again  
 10 with the power to reject, modify, or terminate, one, terms of  
 11 an existing contract. Section K gives the emergency manager  
 12 the power to reject, modify, or terminate an existing  
 13 collective bargaining agreement. Section 12 contains  
 14 provisions for the renegotiation of debt, and it's laid out  
 15 in Section 12. But what Section 1552(m) -- Section 12(m),  
 16 when it deals with the question of pensions, it explicitly  
 17 includes within the section, within the statute, the --  
 18 states that the emergency manager must fully comply with  
 19 Article IX, Section 24, of the Michigan Constitution, which  
 20 is the constitutional prohibition on diminishing or impairing  
 21 contract. In addition, Section 1558 states that the governor  
 22 may place contingencies on a local government in order to  
 23 proceed.

24           When you view the statute -- the authorizing statute  
 25 from the prism of the Michigan rules on statutory

1 construction -- and I cited the Pohutski case, which many --  
 2 is the seminal case on statutory construction in the State of  
 3 Michigan, Pohutski -- the Michigan Supreme Court in Pohutski  
 4 stated, "When parsing a statute, we presume every word is  
 5 used for a purpose. As far as possible, we give effect to  
 6 every clause and sentence. 'The Court may not assume that  
 7 the Legislature inadvertently made use of one word or phrase  
 8 instead of another.' Similarly, we would take care to avoid  
 9 a construction that renders any part of the statute  
 10 surplusage or nugatory." And, in addition, Michigan courts  
 11 follow the doctrine of expression unius exclusion alterius,  
 12 the expression of one thing is the exclusion of another.

13 We would submit that in construing Public Act 436 as  
 14 a whole, in construing it as a whole, any -- you can't allow  
 15 for the filing of a Chapter 9 unless the Chapter 9 includes  
 16 the contingency for not impairing the pension rights under  
 17 Article 24. Otherwise it would negate that section or  
 18 declare that section void, and that would be an express  
 19 violation of the Michigan Rules of Statutory Construction,  
 20 which the Court is bound to follow at this stage in the  
 21 proceeding because in the eligibility proceeding, it is state  
 22 law, state law that is dominant. We believe, based on --

23 THE COURT: But aren't there many, many, many  
 24 conditions that the governor could have put on the filing in  
 25 order to assure the emergency manager's compliance with state



1 law?

2 MR. GOLDBERG: There are certainly different --

3 THE COURT: Equal protection, due process of law,  
4 freedom of speech.

5 MR. GOLDBERG: But what I'm submitting, your  
6 Honor --

7 THE COURT: There are lots of constitutional rights.

8 MR. GOLDBERG: Certainly. But what I'm submitting  
9 is we have to look at the statute as it is written. That's  
10 what the Michigan courts rule over and over again. Those are  
11 the fundamental rules of statutory construction enunciated by  
12 the Michigan Supreme Court in case after case. In this case,  
13 we look at the words of the statute. We don't read into the  
14 statute. We look at the words of the statute. This statute  
15 contains an explicit guarantee of pensions, a guarantee --

16 THE COURT: Well, and the governor says --

17 MR. GOLDBERG: It includes Article IX.

18 THE COURT: The governor says the filing will comply  
19 with state law, doesn't he?

20 MR. GOLDBERG: Well, the governor may say it, but  
21 the governor is not the final arbiter, your Honor. That's  
22 what the Court is for, and what we -- and the governor is not  
23 above the law.

24 THE COURT: Why isn't that a sufficient protection?

25 MR. GOLDBERG: I'm sorry.

1 THE COURT: Why isn't that a specific -- a  
2 sufficient protection?

3 MR. GOLDBERG: Why isn't what the governor says a --

4 THE COURT: No. Why isn't the fact that this Court  
5 will apply state law a sufficient protection?

6 MR. GOLDBERG: Well, we would submit, your Honor,  
7 that state law at this stage of the proceeding, at the  
8 authorization stage, is the determinative factor. Once we go  
9 into the -- once you make the eligibility determination, as  
10 Mr. Montgomery indicated and as the case law as I've read it  
11 indicates as well, that's where federal law -- there's a  
12 question of federal supremacy over state law, but at this  
13 stage it's state law that is determinative, and the state law  
14 in this case explicitly mandates a contingency for the  
15 guaranteeing of pensions. Otherwise we've written that  
16 section --

17 THE COURT: If we're going --

18 MR. GOLDBERG: -- out of the authorization  
19 statute --

20 THE COURT: If we're going to look at --

21 MR. GOLDBERG: -- and that's an explicit violation  
22 of statutory construction.

23 THE COURT: If we're going to look at statutory law  
24 and every word of it, how do you deal with the city's  
25 argument that the word "thereby" in the constitutional

1 provision only prohibits the impairment of pensions by the  
2 state or its political subdivisions; it does not prohibit the  
3 impairment of pensions by a United States Bankruptcy Court?

4 MR. GOLDBERG: That's exactly the point, your Honor.  
5 That's exactly the point. At this stage of the proceeding,  
6 according to Bekins, according to Harrisburg, and according  
7 to every case I've read, according to Collier's, it's state  
8 law that is determinative. That's why --

9 THE COURT: And that's what I'm asking.

10 MR. GOLDBERG: That's why the question --

11 THE COURT: And that's exactly what I'm asking you  
12 about. If we're going to read every word of the statute and  
13 apply every word of the statute, including the word  
14 "thereby," why doesn't state law permit the Bankruptcy Court  
15 to impair pensions?

16 MR. GOLDBERG: Because the authorization statute  
17 that this Court is relying upon, which it has to rely upon  
18 because otherwise there would be no Chapter 9 filing, there  
19 has to be a specific authorization under state law; correct?  
20 I mean there are 20 -- many states don't have one. You have  
21 to rely on the state law. That state law contains an  
22 explicit clause that impair -- pensions cannot be impaired.  
23 It's not just written in one place actually. It's written in  
24 two places in that statute. Again, I'm submitting that down  
25 the road, if we get past this eligibility question on this,

1 perhaps what you said is correct. At that point federal  
2 law -- you make the determination based on federal law, but  
3 right now you are duty bound to make that determination based  
4 on your examination of state law and by applying the state  
5 law --

6 THE COURT: What is the --

7 MR. GOLDBERG: -- principles of statutory  
8 construction.

9 THE COURT: What is the exact state law language in  
10 PA 436 that you rely on?

11 MR. GOLDBERG: I rely on the language -- here, let  
12 me find it right here.

13 THE COURT: Okay.

14 MR. GOLDBERG: "The emergency manager shall fully  
15 comply with the public employee retirement system investment  
16 act and Section 24 of Article IX of the state Constitution,  
17 and any actions taken shall be consistent with the pension's  
18 qualified status"; that he's -- this emergency manager has to  
19 abide by the constitutional impairment.

20 THE COURT: So my question for you remains if this  
21 Bankruptcy Court were to approve a plan -- and I want to say  
22 here I have no predisposition on this issue at all. This is  
23 strictly hypothetical legal talk to figure out where we are.  
24 If this Court were to approve a plan that impairs pensions --  
25 again, not presuming at all that it will -- but if it did, is

1 that the city impairing pensions, or is that the Bankruptcy  
2 Court impairing pensions because --

3 MR. GOLDBERG: That would be impairing --

4 THE COURT: -- the law prohibits the city from doing  
5 it? There's a question about whether it prohibits the  
6 Bankruptcy Court from doing it.

7 MR. GOLDBERG: That's precisely why I'm making the  
8 argument, your Honor. There is a -- there is a question as  
9 to whether -- once we get past the eligibility and this Court  
10 is looking at the plan, whether this Court then has the  
11 authority under federal law to ignore the state law and state  
12 constitutional protection. I'm not saying it does, but  
13 there's at least a question, and a lot of the case law  
14 indicates that, but we're not at that stage right now. We're  
15 at the eligibility stage, and clearly at the eligibility  
16 stage it's state law that predominates. It's state law  
17 that's determinative, and it's state law that this Court has  
18 to look at, not federal law but state law that this Court has  
19 to look at in making its determination as to whether the  
20 authorization meets the muster. And what I would submit,  
21 that under state law principles, as I indicated, we look at  
22 the authorization statute, we look at the plain language of  
23 the statute, and we look at the Michigan rules on statutory  
24 construction as a -- and there's no way to allow for a filing  
25 that would not have a contingency that bars the impairment of

1 pensions. It's interesting to me you raised before to Mr.  
2 Montgomery --

3 THE COURT: Actually, your time has expired, so I do  
4 have to ask you to wrap up.

5 MR. GOLDBERG: Okay. Well, I'll make one last  
6 point. You raised very briefly to Mr. Montgomery why not  
7 every contract, but, as I indicated, other contracts are  
8 provided for the impairment of those contracts under the PA  
9 436. It's the impairment of pensions that's explicitly taken  
10 away from the authority of the emergency manager, and I  
11 submit because of that that any authorization that doesn't  
12 include a contingency barring the impairment of pensions  
13 would violate Michigan state law and violate the Bankruptcy  
14 Code, in essence, itself. Thank you.

15 THE COURT: Thank you.

16 MS. CRITTENDON: Good morning, your Honor. Krystal  
17 Crittendon, and I want to thank the Court for giving me the  
18 opportunity to speak this morning.

19 THE COURT: Welcome, and you may proceed for five  
20 minutes.

21 MS. CRITTENDON: Thank you, your Honor. Before the  
22 Court goes any further, I would just ask that the Court step  
23 back and look at the process and how we got to where we are  
24 from a legal foundational standpoint, and to that end, I make  
25 three objections, your Honor.

1 First, the City of Detroit does not have a duly  
 2 appointed emergency manager because there was no EM or EFM  
 3 law in place at the time that appointment was made. As the  
 4 Court knows, in 2011, Public Act 4, commonly known as the  
 5 Emergency Manager Act, repealed Public Act 72. In November  
 6 of 2012, the people of the State of Michigan repealed Public  
 7 Act 4 by referendum. Pursuant to Michigan law -- and this is  
 8 at MCL, Michigan Compiled Law, 8.4 -- "Whenever a statute, or  
 9 any part thereof shall be repealed by a subsequent statute,  
 10 such statute, or any part thereof, so repealed, shall not be  
 11 revived by the repeal of such subsequent repealing statute."  
 12 In short, that is saying that when PA 4 repealed Public Act  
 13 72 and PA 4 was then repealed by referendum, PA 72 was not  
 14 revived. It did not spring back to life.

15 On March 14, 2013, a contract was purportedly  
 16 entered into between the State of Michigan and Kevyn Orr  
 17 appointing him EFM for the City of Detroit. However -- under  
 18 PA 72. However, because PA 72 was not alive at that time,  
 19 that appointment was not legal and is defective, and for that  
 20 reason, Mr. Orr is not a duly appointed emergency manager for  
 21 the City of Detroit.

22 The second argument, even had there been an  
 23 emergency manager law in place, Mr. Orr would not have been  
 24 an EFM at the time PA 436 came into place because his  
 25 contract, the contract between he and the state, was expired

1 on the day that PA 436 came into place, so he would not have  
2 been grandfathered in under PA 436.

3 Finally, under Chapter 9 of the Bankruptcy Code,  
4 there is no ability for there to be an involuntary  
5 bankruptcy, and because the municipality would had to have  
6 filed the petition, and in this case the municipality, being  
7 the mayor and City Council, did not file the petition, the  
8 petition filed by Mr. Orr was defective, and the filing  
9 should be dismissed.

10 For those reasons -- and I see that my yellow light  
11 is on -- time goes really really quickly when you have five  
12 minutes, but I'd answer any questions the Court has.

13 THE COURT: Hoe much time is left when the yellow  
14 goes on, Kelli? Do you know?

15 THE CLERK: Three minutes.

16 THE COURT: It's three minutes, so you only --

17 MS. CRITTENDON: Okay.

18 THE COURT: -- had two under green and three under  
19 the yellow, so --

20 MS. CRITTENDON: Okay. Thank you, your Honor.

21 THE COURT: -- you may proceed.

22 MS. CRITTENDON: Mr. Orr's contract at Section 2.2  
23 of that contract provides that his contract was effective on  
24 Monday, March 25th, and terminated at midnight on Wednesday,  
25 March 27th. Midnight March 27th was a Wednesday morning at



1 12 o'clock a.m. The new emergency manager law, PA 436, did  
 2 not take place -- did not become effective until Thursday,  
 3 March 28th. Under 14 -- MCL 141.1572, it provides that an  
 4 emergency manager or emergency financial manager appointed  
 5 and serving under state law immediately prior to the  
 6 effective date of this Act shall continue under this Act as  
 7 an emergency manager for the local government. Because the  
 8 City of Detroit was without an emergency manager or emergency  
 9 financial manager for one full day before the Emergency  
 10 Manager Act, PA 436, became effective, Mr. Orr could not  
 11 continue in that capacity, as used in this section, because  
 12 he was without a contract.

13 Finally, I would just say there are a number of  
 14 cases under the federal Bankruptcy Court law that talk about  
 15 involuntary bankruptcies. This is akin to an involuntary  
 16 bankruptcy when someone other than the City of Detroit, which  
 17 is its mayor and City Council, filed the petition. And for  
 18 those reasons, the petition was defective. Section 109 of  
 19 the Bankruptcy Code talks to the authorization of the state  
 20 to approve a bankruptcy if filed by a municipality. In this  
 21 case, that is not what happened. It was the state  
 22 effectively filing the petition and approving the petition  
 23 being that the emergency financial manager, assuming that we  
 24 had one, would be an operative of the state and not an  
 25 operative of the City of Detroit. Thank you, your Honor.

1 THE COURT: Is the contract on which you rely in the  
2 record of the case?

3 MS. CRITTENDON: I don't believe it is. I do have a  
4 copy of the contract with me if the Court would like to see  
5 it. I'm assuming that one of the parties --

6 THE COURT: If you'd like me to consider it, you  
7 should --

8 MS. CRITTENDON: I will file it.

9 THE COURT: -- file it.

10 MS. CRITTENDON: I will, and I will file a brief  
11 that memorializes everything that was said today.

12 THE COURT: All right.

13 MS. CRITTENDON: Thank you, your Honor.

14 MR. MORRIS: Good morning, your Honor. Thomas  
15 Morris on behalf of the Retiree Association parties. The  
16 Retiree Association parties who I represent include two  
17 individuals. There was some discussion about the committee's  
18 standing to raise certain objections. The committee argued  
19 those objections very ably. We concur in those objections,  
20 and that includes the concurrence of those individuals. We  
21 trust that would take care of any standing issue if there  
22 were one. And the comments that preceded us -- preceded me  
23 were very ably made, so I'm just going to address a very few  
24 points.

25 One is a point the Court -- a question the Court had

1 raised about the "thereby" language in the pensions clause.  
2 It's important for the Court to note that it's the city that  
3 files any plan, the city that proposes any plan, negotiates  
4 any plan. Chapter 9 precludes the Court from appointing a  
5 trustee, from converting the case, from interfering with the  
6 city's ability to manage its fiscal affairs. A case cannot  
7 be filed involuntarily under Chapter 9. As the Bekins court  
8 said, quoting from the legislative history on page 51, "The  
9 taxing agency itself is the only instrumentality which can  
10 seek the benefits of the proposed legislation." We think  
11 it's clear that any action to impair the pensions by the city  
12 would, first of all, be improper, but, second of all, it  
13 would be the city's action.

14 Now, the city has taken the position that somehow  
15 the pensions clause of the Michigan Constitution is  
16 preempted, and we disagree with that, but the city can't have  
17 it both ways. They have a theory -- they've made a number of  
18 multiple arguments, but they have a theory that once they got  
19 into Bankruptcy Court -- or if they get -- are found  
20 eligible, then the pensions clause is off. Well, if that's  
21 the case -- and it's not the case, but if that were the case,  
22 then it would be the action of the authorization of the  
23 filing and the action of the city in filing the case which  
24 would be impairing the pensions. What happens if the city is  
25 found ineligible?

1           THE COURT: Well, but that's true only if as part of  
2 eligibility the Court ruled on the issue of pension rights  
3 and ruled in the city's favor.

4           MR. MORRIS: This ties in with arguments that were  
5 made by other counsel, and if Public Act 436 enables the city  
6 to impair the pensions, then Public Act 436 in that respect  
7 is unconstitutional. It's inconsistent with the pensions  
8 clause. Of course, the pensions clause is part of the  
9 Michigan Constitution, the supreme law of our state, and the  
10 Public Act 436 must comply with it. Public Act 436, in fact,  
11 gives recognition to the pension clause and acknowledges it,  
12 and it even authorizes the governor to make compliance with  
13 the pension clause a precondition. However, that didn't  
14 happen in this case, and that's one of the -- one of the  
15 issues that has been raised by other counsel.

16           Your Honor, if the city is found to be ineligible,  
17 from the standpoint of the retirees, the city will have to  
18 make a choice. It can choose to comply with the pensions  
19 clause and not impair pensions, just say we're going to  
20 comply with the Michigan Constitution, or it can negotiate  
21 with the retirees through their associations. That process  
22 was shortcut here, and that will be one of the factual issues  
23 we've raised.

24           Now, if the city goes forward with a plan that does  
25 not impair pensions, one of the Court -- one of the questions

1 the Court had was what happens then, what happens if the city  
2 just doesn't have the money. Well, there's an issue of  
3 whether the state is liable. There's the potential issue.  
4 But those are all issues apart from -- they're nonlegal  
5 issues. The most the retirees can ask for is that the city  
6 doesn't impair the pensions. The ultimate solution for the  
7 retirees comes elsewhere. Will the city have -- will the  
8 state have to step in to help the city? Will the city have  
9 to do other things to raise money? I don't know, but those  
10 are beyond our legal issues.

11 Your Honor, the city holds the key on this issue of  
12 eligibility. It can agree to comply with the Michigan  
13 Constitution or it can negotiate with the retirees and reach  
14 a resolution. The proper outcome here is for the city to go  
15 back -- as Section 109 intends, go back and either not impair  
16 the pensions, which is our preference, or negotiate with the  
17 retirees. Thank you.

18 THE COURT: Thank you.

19 MS. FLUKER: Good morning, your Honor. Vanessa  
20 Fluker on behalf of Center for Community Justice and  
21 Advocacy.

22 THE COURT: Would you repeat your name for me,  
23 please?

24 MS. FLUKER: Vanessa Fluker.

25 THE COURT: Okay. Thank you.

1 MS. FLUKER: F-l-u-k-e-r. Your Honor, the issue I'm  
2 raising today before this Court with respect to eligibility  
3 is a failure of the emergency manager to comply with the  
4 statutory mandates under PA 436, Section 16, which is  
5 actually Section 1556. That section specifically mandates,  
6 and I quote, "an emergency manager shall," not "may," not  
7 "might," "shall, on his own -- his or her own or upon the  
8 advice of the local inspector if a local inspector has been  
9 retained, make a determination as to whether possible  
10 criminal conduct contributed to the financial situation  
11 resulting in the local government's receivership status. If  
12 the emergency manager determines that there is a reason to  
13 believe criminal conduct has occurred, the manager shall  
14 refer the matter to the attorney general or local prosecuting  
15 attorney for investigation." There has been some extensive  
16 arguments about the tenets of statutory construction, so I  
17 won't go through Pohutski step by step, but we're all aware  
18 that you must adhere to the plain unambiguous language of the  
19 statute.

20 In this particular instance, two of the city's  
21 largest creditors, UBS and Bank of America, have been found  
22 convicted -- criminally convicted in UBS's case of criminal  
23 conduct involving municipal bonds. In fact, the SEC fined  
24 UBS \$47,207,180 in Case Number 11-2539, U.S. District Court,  
25 New Jersey. Three UBS executives were indicted and convicted

1 of fraud related to municipal bond rigging, and that was in  
2 New York, Southern Division, Case Number 10-1217. A Bank of  
3 America executive was indicted July 19th, 2012, for bid  
4 rigging of fraud municipal bonds. And what's so significant  
5 about this, in the criminal conviction with the SEC case, the  
6 civil penancy case, it involved a Detroit bond. This  
7 provision cannot be ignored, and the mere fact that it's  
8 mandatory because it indicates "shall" is very significant.  
9 In fact, it is common knowledge at this point that the  
10 emergency manager had knowledge of this information and did  
11 not act on it. In his deposition on August 30th, 2013, he  
12 was specifically asked on these issues,

13 "Are you aware of issues that have come out with  
14 regard to the LIBOR specifically with UBS and Bank  
15 of America in the setting of using the LIBOR as a  
16 standard?

17 Answer: I am aware.

18 Question: Are you aware that UBS has been sued  
19 by the Securities and Exchange Commission for  
20 rigging in regard to municipal bonds?

21 In past years?

22 There was a final judgment -- yes, in past  
23 years.

24 Answer: Yes. I've heard that. I have not read  
25 the final judgment.

1           Question: Are you aware that Bank of America  
2           has been investigated for potential bond rigging  
3           with regard to the municipal bond market?

4           Answer: I am aware that Bank of America has  
5           been investigated. The exact specifics of the  
6           investigation I am not aware of."

7           This clearly shows that there is not just a  
8           noncompliance with 1556, there's a knowing noncompliance with  
9           1556. There should have been a criminal investigation, which  
10          is mandated by the statute, and, in essence, is necessary to  
11          even get to the point of making a recommendation for a  
12          bankruptcy. How can you say that we need bankruptcy when you  
13          don't know whether there is going to be fraud determined and  
14          there may be funds that may be necessary to be paid back to  
15          the city that can offset any debt, which also goes to the  
16          issue of how are you saying that you're eligible for  
17          bankruptcy when you really don't know what the debt is based  
18          on the potentiality of fraud in these municipal bond  
19          transactions, who are also standing --

20          THE COURT: Are you saying that the emergency  
21          manager, whose term in office is limited by law, was required  
22          to await what could be years of litigation to determine these  
23          issues and UBS's liability before filing bankruptcy?

24          MS. FLUKER: I don't think he had to determine years  
25          of litigation, but I think that it would be very evident that



1 you would look at least at the debt that you're alleging that  
2 the city owes, and if there is common knowledge of such  
3 information, which this is -- this is not something that you  
4 have to wait years in litigation. This has been all over the  
5 news, the Internet, and everything else. And as he admitted  
6 in his deposition, he was aware of it, and that being the  
7 case, that actually heightens the duty, in addition to the  
8 mandatory language of Section 1556, which says "shall."

9 THE COURT: Shall do what?

10 MS. FLUKER: The statute specifically says the  
11 emergency manager shall, on his or her own or upon the advice  
12 of a local inspector, make a determination -- there had to be  
13 a determination made -- whether there was criminal conduct  
14 that affected the financial situation of the city. Even if  
15 he didn't know all this, say for some reason this  
16 information -- I see my time is up. I'll just complete this  
17 sentence. Say this information he had no knowledge of.  
18 There was -- we just don't know about it. He still had a  
19 duty to make a determination. Well, in my estimation,  
20 there's been no criminal conduct that contributed to the  
21 financial situation of the city. This provision was not  
22 complied with at all, and you cannot try to exercise one part  
23 of the statute by totally ignoring and having noncompliance  
24 with another. Therefore, I would request that this Honorable  
25 Court deny eligibility for the reasons set forth by all the

1 objectors.

2 THE COURT: Thank you.

3 MS. FLUKER: Thank you.

4 THE COURT: Mr. Gordon, may I have your attention,  
5 please?

6 MR. GORDON: Yes, your Honor.

7 THE COURT: Are you up next?

8 MR. GORDON: I am.

9 THE COURT: Okay. Do you want to give part of your  
10 argument now, or do you want to take a lunch break now and  
11 then do your entire argument after lunch? I leave it to you.

12 MR. GORDON: If it's okay with the Court, I would  
13 prefer the latter, to just start after lunch.

14 THE COURT: Okay. All right. We will take our  
15 lunch break now, and we will reconvene in an hour and a half,  
16 so that'll be 1:20, please. Twenty after one we'll  
17 reconvene.

18 MR. GORDON: Thank you, your Honor.

19 THE CLERK: All rise. Court is in recess.

20 (Recess at 11:48 a.m., until 1:20 p.m.)

21 THE CLERK: Court is in session. Please be seated.

22 Recalling Case Number 13-53846, City of Detroit, Michigan.

23 THE COURT: Good afternoon, everyone. It looks like  
24 everybody is here. Actually, Mr. Gordon, with your  
25 permission, before I hear from you, I have a follow-up

1 question for one of your colleagues.

2 MR. GORDON: By all means, your Honor.

3 THE COURT: Ms. Brimer, would you resume the  
4 lectern, please?

5 MS. BRIMER: Should I bring something with me, your  
6 Honor?

7 THE COURT: Possibly.

8 MS. BRIMER: I didn't know I was going to the  
9 principal's office.

10 THE COURT: No, no, no. It's nothing like that.  
11 You argued that the enactment of PA 436 violated the people's  
12 referendum rights because PA 436 was so similar to PA 4.

13 MS. BRIMER: Yes, your Honor.

14 THE COURT: That was your argument. Was there a  
15 statutory basis for that argument, or was it just based on  
16 the people's right of referendum?

17 MS. BRIMER: It's based on the constitutional right  
18 of referendum, your Honor.

19 THE COURT: Okay. So there's not a statute we  
20 should be looking for on that.

21 MS. BRIMER: Not that I'm aware of, your Honor.

22 THE COURT: All right. That was it.

23 MS. BRIMER: Thank you, your Honor.

24 THE COURT: That was it. Okay. Mr. Gordon.

25 MR. GORDON: Thank you, your Honor. Just to give

1 your Honor a little bit of a road map of the things that I  
2 want to touch upon, if that's of help, I thought I would  
3 touch upon some of the issues regarding the state law  
4 consent, some of the issues that have been raised this  
5 morning, then move on to a discussion of some other  
6 considerations relevant to the difference between the  
7 pensions clause and the contract clause, and then address the  
8 issue of what would happen if the Court ruled in our favor  
9 that the accrued pension benefits cannot be impaired and what  
10 that means for the restructuring, and I think I can add some  
11 important information there. And then finally, if there's  
12 still time, I would touch upon the collateral estoppel  
13 Webster issue, which is in our papers.

14 So, your Honor, we will start with the consent  
15 issues under 109(c)(2), and to be clear, in our papers, while  
16 we talk -- touch upon the possibility of PA 436 being  
17 unconstitutional as applied, the thrust of our papers is that  
18 PA 436 needs to be read and can be read in a way that's  
19 consistent with the pensions clause and so forth so that  
20 there's no need to get to issues of constitutionality.  
21 109(c)(2) clearly is an issue that is an issue purely of  
22 state law. It is a threshold issue. It is an eligibility  
23 issue, and we want to emphasize that it stands on its own,  
24 and it can't be conflated with plan confirmation issues.

25 THE COURT: And with apologies, I have to stop you

1 there with this question. There seems to be a general thread  
2 of assumption that whether a state has given authorization  
3 under 109(c)(2) is a question of state law, as you just said.  
4 I have to say that's not altogether clear to me. It seems to  
5 me there might very well be an argument that the standard as  
6 to whether the state has given proper authorization is a  
7 federal standard, not a state standard. Why? Because in  
8 addressing cases in the amendment right next door to Article  
9 X -- that is, Article XI -- sorry -- Amendment XI, the 11th  
10 Amendment, when we talk about sovereign immunity, the issue  
11 of whether a state has given its consent or its waiver of  
12 sovereign immunity is a question to be determined by federal  
13 law, not state law.

14 MR. GORDON: Your Honor, in that regard, I think  
15 that the Tenth Amendment is different, and it looks first to  
16 respect the contours of what is reserved to the states in the  
17 first instance, so here I think you have to start with  
18 whether there is valid -- I think, at a minimum, the question  
19 is is there valid state authorization for submitting a  
20 political subdivision of the state to the jurisdiction of the  
21 federal government and the federal courts. I would at least  
22 put it that way. And so that does turn on state law, and we  
23 would submit that all portions of state law need to be looked  
24 to and harmonized in that regard, and that's sort of the  
25 holding of Harrisburg, which we submit is instructive here

1 and which has not been really in any way refuted by the city.  
2 And even the United States Attorney has stated that Congress  
3 reserved to the state the right to regulate, and I quote,  
4 "under what terms," end quote, its political subdivisions may  
5 avail themselves of Chapter 9, so it really is a matter, I  
6 believe, of state sovereignty, and it's up to the state to  
7 determine how and when a political subdivision can avail  
8 itself, and how it does that is in part expressed by the will  
9 of the people, as embodied in the pension clause, and it  
10 needs to be respected.

11           The response of the city and the state is on two  
12 levels. One, first of all, it is asserted that the actions  
13 of the governor in authorizing do not conflict with the  
14 pensions clause because the authorization itself didn't  
15 create any impairment and that it's unclear whether the city  
16 will ultimately seek to impair, and if such impairment  
17 occurs, it won't be the city or the state that has done it.  
18 It'll be the Bankruptcy Court. Respectfully, we say that  
19 those arguments are all unavailing. First of all, one of the  
20 things that I think has not been made clear this morning is  
21 some of the things that have come out in discovery. I don't  
22 actually think these things are relevant, but I'll get to why  
23 I think they're not relevant in a minute, but I think it's  
24 important for the Court to know that in discovery propounded  
25 by the Retirement Systems or conducted by the Retirement

1 Systems, the city has admitted that it was an explicit intent  
2 in the restructuring plan proposed in June and in the  
3 bankruptcy recommendation letter submitted on July 16th by  
4 Mr. Orr that accrued pension benefits needed to be impaired.  
5 The city has also admitted in admissions that its intent in  
6 the Chapter 9 case is to impair and diminish accrued pension  
7 benefits, so there is absolutely nothing speculative about  
8 that. The governor has also testified that he was aware that  
9 accrued pension benefits may be impaired. He also testified  
10 that he understood that he could put conditions on the  
11 consent and authorization and that he chose not to. Mr. Orr  
12 also testified that he could not guarantee that if a  
13 consensual plan couldn't be achieved, that he would not  
14 resort to cramdown provisions in order to cram down upon the  
15 retirees. So there really is nothing speculative here, and  
16 for anyone to say that it is speculative is really -- I mean  
17 it just is not -- it's just not factual.

18 THE COURT: Well, but what would be the --

19 MR. GORDON: The other thing is that --

20 THE COURT: What would be the impact on that  
21 argument if the state, under this Constitution, does have a  
22 legal constitutional obligation to guarantee the pension  
23 payments, an issue not yet determined? And I don't mean to  
24 suggest the outcome of that by raising this possibility.

25 MR. GORDON: Your Honor, I mean if the -- the

1 problem is that today is the day for eligibility, and we  
2 don't know that today. If the state came forward today and  
3 said that they would backstop, you know, the full accrued  
4 pension benefits, that might be a different situation, but it  
5 not being here today, that isn't --

6 THE COURT: And you're not prepared to say here  
7 today that you're not going to request that conclusion, are  
8 you?

9 MR. GORDON: No. I will not say that, but that's --

10 THE COURT: That would not be in your client's best  
11 interest.

12 MR. GORDON: Of course not. Of course not, but that  
13 has not been determined today. The state is not coming  
14 forward today. And eligibility goes to whether this Court  
15 even has jurisdiction, and what the city is asking is for the  
16 Court to essentially suspend the issue of whether it even has  
17 jurisdiction in order to get everybody together, and really  
18 you're putting the will of the people and the protections of  
19 the Michigan Constitution in jeopardy or being held in the  
20 hold while the city wants to move forward with its proposals  
21 and bring people to the table, and I would submit that that's  
22 inappropriate. This is an eligibility hearing, and the  
23 governor's responsibility is an affirmative responsibility to  
24 uphold the Constitution. To suggest that we don't know  
25 what's going to happen down the road reduces his obligation



1 to sort of a wink and nod type of standard, and we submit  
2 that that is just inappropriate. He is to uphold the  
3 people's will.

4 THE COURT: Well, he's to uphold the law.

5 MR. GORDON: The other thing is, your Honor, that to  
6 say that someone other than the state or the emergency  
7 manager would be the one impairing the benefits is just not  
8 correct. As the Court well knows, the city is the one that  
9 would have to propose the plan. The Court would not propose  
10 the plan. Essentially what is happening here would be that  
11 the governor, through the authorization, is delegating  
12 authority that he does not have. He does not have the  
13 authority to abrogate the state Constitution. By authorizing  
14 the emergency manager to pursue the bankruptcy -- again,  
15 we're at the eligibility stage -- he cannot give authority to  
16 the emergency manager that he does not have, so the question  
17 becomes --

18 THE COURT: The argument is he doesn't have the  
19 authority to impair the pensions.

20 MR. GORDON: That's correct. If he wanted to do  
21 that, he'd have to go get a constitutional amendment.

22 THE COURT: And -- okay.

23 MR. GORDON: So he does not have the authority to  
24 delegate or to bestow upon anybody else the ability to  
25 impair, so the question really is why wouldn't we put a

1 condition today saying that you can move forward in the  
2 Chapter 9, but you can't impair the accrued pension benefits?  
3 That to us complies with the requirements of the state  
4 structure, and there has absolutely been no explanation of  
5 why that wouldn't be done today. We think that's the real  
6 question is why wouldn't you -- why wouldn't the governor put  
7 that condition in or why can't the Court imply that as a  
8 matter of law?

9 If I may, your Honor, I'd like to move on to the  
10 pensions versus contracts issue.

11 THE COURT: Well, hold on one second. The Sixth  
12 Circuit has actually addressed -- I know you're concerned  
13 about time --

14 MR. GORDON: Okay.

15 THE COURT: -- the issue of how to determine  
16 eligibility in bankruptcy, now not in Chapter 9, but it did  
17 so in Chapter 13 because there is a factual eligibility issue  
18 there, has to do with debt limits, and there are times when  
19 creditors say that the debtor's debts are above the debt  
20 limits, and, therefore, the debtor is not eligible, so the  
21 Sixth Circuit -- the case is Pearson if you're familiar with  
22 it. It says -- it recognizes that at the eligibility stage  
23 of a bankruptcy, you don't want to go through the process of  
24 fixing claims, but there is this law that sets debt limits,  
25 so we have to give it some respect. So the solution it came

1 up with in that context was we're just going to look at  
2 whether the debtor in good faith asserts that its debts are  
3 below the debt limit. And for those of you who want it, it's  
4 773 F.2d 751, 773 F.2d 751, a 1985 case from the Sixth  
5 Circuit. Pearson is P-e-a-r-s-o-n. Why not apply a similar  
6 standard to eligibility here?

7 MR. GORDON: Because there's no good faith issue  
8 here. The question is very simple and can be solved today.  
9 Are you going to impair pension -- accrued pension  
10 obligations? You can't. The law says so. So put the  
11 condition on it today, and we move forward.

12 THE COURT: So your assertion is that it wouldn't  
13 even be a good faith argument by the city.

14 MR. GORDON: Doesn't matter what their intention  
15 actually is. The condition should be applied today because  
16 that is how -- that is the only way a --

17 THE COURT: It wouldn't be a good faith --

18 MR. GORDON: -- political subdivision can avail  
19 itself --

20 THE COURT: It wouldn't be a good faith argument for  
21 the city to assert that although the Michigan Constitution  
22 prohibits it from impairing pensions, it does not prohibit  
23 the Bankruptcy Court from impairing pensions. That would not  
24 be a good faith argument?

25 MR. GORDON: No, your Honor. I think that that's

1 something that can and should be dealt with today. Let me  
2 give an example. What if the only debts of the city today --  
3 as we stand here today were pension obligations? Would you  
4 say then we should wait and see what happens? We know what  
5 would happen. Is it any different because there's other  
6 creditors in the room?

7 THE COURT: Well, do we know --

8 MR. GORDON: I haven't --

9 THE COURT: Do we know -- do we know what would  
10 happen? Do we know, for example, that there would be no  
11 agreed upon negotiation? Do we know, for example, that the  
12 state won't fill in the gap?

13 MR. GORDON: Well, let's -- I can talk about that.

14 THE COURT: Now would be the time.

15 MR. GORDON: If you want to talk about that, I'll  
16 skip to that. I'll skip to that since that seems to be  
17 something that is troubling your Honor or at least on your  
18 mind. We have emphasized --

19 THE COURT: A question.

20 MR. GORDON: We have emphasized that the Retirement  
21 Systems aren't saying the city can't proceed with a Chapter 9  
22 case. It simply must condition the case upon the  
23 preservation of the pensions clause. And certainly in some  
24 people's minds this begs the question of whether in the event  
25 the Court agreed and ruled that accrued pension benefits may

1 not be impaired, could the city still effectively reorganize  
2 and restore itself to financial health through a bankruptcy,  
3 and while we've indicated that there is still information  
4 that we need -- and it's material information -- we continue  
5 to do so -- I believe I can stand here today and say that  
6 based upon the information that we do have, it is clear that  
7 the city can effectively reorganize even if accrued pension  
8 benefits cannot be impaired.

9           Just some thoughts and facts for your Honor. The  
10 city talks about \$18 billion in debt, but \$6 billion of that  
11 \$18 billion is special revenues that are supported by the  
12 Detroit Water and Sewer System, so now you really have \$12  
13 billion of debt that needs to be supported by the general  
14 fund and other cash flows from the enterprise funds and so  
15 forth. Of that \$12 billion of debt, roughly half, six  
16 billion, is OPEB healthcare actuarially calculated. Another  
17 two billion is unsecured bond debt. So fully two-thirds of  
18 the \$12 billion of debt is very much subject to restructuring  
19 and compromise in bankruptcy. Those are unsecured claims.  
20 That's two-thirds of the \$12 billion of debt right there. So  
21 there's a tremendous opportunity to unburden the city of the  
22 debt obligations -- of these debt obligations and the demands  
23 on its cash flow.

24           In addition, although not critical to this position,  
25 above the line in the emergency manager's restructuring plan

1 proposed in June is the swap periodic payment, which is  
2 soaking up \$50 million a year in casino tax revenues. And as  
3 the Court knows -- and, again, I'm not going to argue it  
4 here, but, as the Court knows, the Retirement Systems have  
5 objected to the treatment of the swaps as secured in those  
6 revenues both because the lien is not valid and, even if  
7 valid, it does not reach the post-petition revenues. Also --  
8 and if it was determined to be an unsecured claim, then you  
9 have a \$300 million claim now that is given unsecured status  
10 and can also be a compromise in the bankruptcy.

11 Also, it should be kept in mind that we're talking  
12 about accrued benefits that need to not be impaired. There  
13 are obviously prospective benefits that could be impaired, so  
14 there are a number of different ways that the city can  
15 achieve real relief from its debts. Obviously it spreads the  
16 pain in different directions, but we've -- but by looking at  
17 it, your Honor, there is absolutely an opportunity to do  
18 something. And when they --

19 THE COURT: Isn't there also a question of fact as  
20 to what the underfunded liability is for pensions?

21 MR. GORDON: And let me get to that. It's also  
22 critical for the Court to understand that if the Court ruled  
23 in our favor and said that there cannot be an impairment of  
24 the accrued benefits, that does not mean the Retirement  
25 Systems walk away from the table. The Retirement Systems has

1 said that they are committed to working with the city to be  
2 part of the solution here. That means a number of things.  
3 The city has indicated that it needs to devote significant  
4 cash flows in the next five years, according to the proposal  
5 in June, \$1.25 billion in the next five years for  
6 reinvestment in the city. The Retirement Systems don't  
7 object to the concept and understand that the city needs to  
8 reinvest, but after that five years, that reinvestment is  
9 done. The cash flows of the city become much larger again,  
10 and they will improve at five years and the next five years  
11 and the next five years. And the Retirement Systems can be  
12 flexible because the Retirement Systems issues, the pension  
13 issues, are long-term issues. They're not short-term issues.  
14 So if there are cash flow issues, the Retirement Systems can  
15 work with that. The \$3-1/2 billion number that's been thrown  
16 out there is not an amount that is due today if the pension  
17 systems are not frozen and closed. That is an actuarial  
18 calculation of what will be due over the next 30 years to  
19 bring the funding level up to what it needs to be. That's  
20 not the amount that is due on a cash flow basis tomorrow or  
21 the next day, so there is flexibility there.

22 Also, it should be understood that over time if the  
23 economy improves or interest rates rise, and/or, the  
24 underfunding level may go up or down, so there's a lot of  
25 things in play there, and when you take that all together,

1 we --

2 THE COURT: And I certainly appreciate and commend  
3 your clients' willingness to work with the city, but  
4 prudentially from the standpoint of ripeness apart from  
5 constitutional issues, doesn't that suggest putting off until  
6 plan confirmation the issue of the constitutional right?

7 MR. GORDON: Your Honor, again, I would submit that  
8 that is conflating eligibility, which is one question, with  
9 what can be done under a plan. If this Court does not have  
10 jurisdiction because the authorization was not appropriate,  
11 if you're putting -- what you're suggesting -- or the city is  
12 suggesting is you're putting the uncertainty -- you're  
13 putting at risk a state protected benefit in order to  
14 leverage people to get in a room and negotiate. And I  
15 suggest, as a matter of jurisprudence, that is inappropriate.

16 I wanted to also mention, your Honor, other benefits  
17 of a ruling in favor of the concept that the pension benefits  
18 cannot be impaired. It, in fact, would help the city in its  
19 restructuring in other ways. Absent a ruling on this issue  
20 in favor of the nonimpairment of pension benefits, the  
21 parties will struggle to negotiate in the shadows of this  
22 unresolved issue. What will happen is that the parties will  
23 have to negotiate on a dual path against the backdrop of  
24 still having these arguments under the pensions clause, under  
25 Section 943, and so forth that are all or nothing arguments



1 that would -- if ruled on in a certain way, would come to the  
2 conclusion that you can't impair us at all. So it makes the  
3 negotiations very difficult, and it also obviously -- as long  
4 as that matter is not resolved or if it's not resolved in  
5 favor of the pension systems, it becomes -- it makes the case  
6 much more litigious and encumbers the entire process. If the  
7 Court rules in our favor -- and, again, these are just, you  
8 know, some additional thoughts for the Court because I  
9 understand the struggle. If the Court rules in our favor,  
10 there will be less moving parts for the city to deal with and  
11 for the parties to deal with, and it makes the negotiation  
12 process much more streamlined. And if at some point in time  
13 that decision were reversed and there was a decision that  
14 said that the pension clause can be abrogated or impaired in  
15 some fashion, having to revise the negotiations at that point  
16 and spread the pain around a different way is a lot easier  
17 than starting from the other end. If you start from the end  
18 that we're at now, it's very hard, again, for the parties to  
19 negotiate. And if the -- and if it's determined ultimately  
20 that you can't abrogate the pension clause, then you're  
21 really going back to square one, and we've lost a ton of time  
22 in the negotiation process. We submit that it's much easier  
23 to negotiate against a backdrop that says that the pension  
24 clause must be upheld.

25 Moreover, a ruling in our favor in that regard helps

1 the city in other ways. It calms the workforce knowing the  
2 accrued and prospective accrued pension benefits will be  
3 protected. This will enable the city to retain its most  
4 talented personnel. In addition, the ultimate commitment of  
5 funds to the Retirement Systems as opposed to financial  
6 creditors benefits the city because the systems will also  
7 invest in the city, as they always have done. And a majority  
8 of the pensioners live within the city and pay taxes and  
9 consume goods and services in the city, so the Retirement  
10 Systems are an economic engine that really is part of the  
11 solution for the city, so I want to address all those.

12 THE COURT: Well, but so were the bondholders and  
13 the bond investors.

14 MR. GORDON: They don't live in the city, and they  
15 aren't putting money back into the city, your Honor. They  
16 are not part of that economic engine, and if they get paid  
17 their debt service, there's no --

18 THE COURT: Hang on.

19 MR. GORDON: -- guarantee that they're going to  
20 reinvest in the city.

21 THE COURT: Didn't I read in the newspaper that the  
22 city just got \$350 million?

23 MR. GORDON: I'm sorry.

24 THE COURT: Didn't I just read in the newspaper that  
25 the city just got \$350 million to help with its reinvestment?

1           MR. GORDON: No, your Honor. What we read was that  
2 there's a proposal to secure unidentified assets at this  
3 point but probably to encumber all sorts of assets of the  
4 city in order to get \$350 million of which 200 million would  
5 immediately go out to pay swap participants who don't deserve  
6 to get paid anything as a secured creditor, and then the  
7 other 150 million is going to be used in some ways that's  
8 been unidentified, so basically you're encumbering assets of  
9 the city for purposes that don't benefit the city in any  
10 demonstrable way at this time, so I would disagree with that  
11 characterization.

12           THE COURT: Okay.

13           MR. GORDON: So, your Honor, for all those reasons,  
14 I think that if the Court were to rule, again, as a pragmatic  
15 matter, in favor of finding that this case should not move  
16 forward without the condition that there cannot be an  
17 impairment and that the pension clause must be upheld, it  
18 does not mean this case comes to an end by a long -- quite  
19 the opposite. In our opinion, it makes this case much more  
20 manageable. It makes the negotiations easier. And it, in  
21 our minds, provides a much clearer path to a consensual  
22 resolution.

23           THE COURT: So you think I can find them eligible  
24 and find that pensions can't be impaired? How do I do that  
25 because the issue is yes or no, the city is eligible.

1 MR. GORDON: That's correct, your Honor. You would  
2 have to -- it would be up to the city to either -- and the  
3 state to either agree to -- well, there's a couple different  
4 ways.

5 THE COURT: This is the refiling scenario?

6 MR. GORDON: You could either -- you could either  
7 rule that the obligation to uphold the pension clause is  
8 implied by law because otherwise you don't have valid  
9 authorization, there isn't valid state authorization, or you  
10 can provide the option to the state and the city to  
11 explicitly confirm that process.

12 THE COURT: Oh, I see. So you're saying I can read  
13 into the authorization the nonimpairment of pensions even  
14 though the governor explicitly rejected that.

15 MR. GORDON: The governor actually didn't. The  
16 governor testified that he didn't know whether he had to  
17 uphold that, and he decided to choose not to put the  
18 condition on it and leave it to the courts, which we suggest  
19 is not necessarily appropriate but is --

20 THE COURT: So he rejected the concept of  
21 conditioning his authorization on nonimpairment of pensions.

22 MR. GORDON: He did, but he also said he was  
23 basically deferring to the courts as to how that should play  
24 out, which is ironic because the Webster court has already  
25 ruled on that issue.

1           Your Honor, I'll turn to the pensions clause, which  
2 is the contracts clause, if I may.

3           THE COURT: Sure.

4           MR. GORDON: The concept that the pensions clause is  
5 the same thing as the contracts clause just applying to  
6 pensions does violence to the language of the pensions  
7 clause, as has already been discussed.

8           THE COURT: Right.

9           MR. GORDON: I won't get into that. Obviously we've  
10 pointed out that the pensions clause is more specific and  
11 that it was enacted long after the contracts clause and that  
12 those things together, as a matter of the canons of  
13 construction, would indicate that the pension clause must  
14 mean something more and something different from the  
15 contracts clause.

16          THE COURT: Right. So what more and what different?

17          MR. GORDON: Well, it starts with looking at why and  
18 the environment in which these things were done and looking  
19 at the actual language of the two clauses. The contracts  
20 clause was adopted back when the government was being formed,  
21 and it helps sort of support the structure of the government  
22 as it's being developed in terms of federalism and making  
23 sure that states don't impair their -- pass laws that impair  
24 their own contracts or pass laws that favor their citizens  
25 over other citizens. That was the general nature of it. And

1 it's directed, you'll note, to the legislature of the state.  
2 The state shall not pass laws that will impair contracts. So  
3 that's the contracts clause. Now you fast forward --

4 THE COURT: That's the federal contracts clause.

5 MR. GORDON: And the state, as well as the state  
6 contracts clause. So then you fast forward -- I don't know  
7 how long -- 150 years to 1963, and you're talking about the  
8 constitutional convention and the pensions clause, and what's  
9 going on at that point in time? Well, pensions are not being  
10 funded. They're underfunded across the state I'm told to the  
11 tune of maybe \$600 million, and guess what? Front and center  
12 is the City of Detroit that was not paying pensions for its  
13 teachers' pensions funds. So the convention decided it  
14 needed to do two things.

15 THE COURT: Well, at that point they were also not  
16 being treated as contracts; right? They were being treated  
17 as gifts I think was the phraseology.

18 MR. GORDON: As gratuities. That's correct, your  
19 Honor. So the convention decided it needed to do two things.  
20 The convention decided, first of all, to avoid municipalities  
21 digging a deeper hole, they were going to put a provision in  
22 the Constitution that said that local governmental units will  
23 fund their current year's employer contributions in that year  
24 to help avoid digging a deeper hole. Secondly, to protect  
25 the accrued and unfunded liabilities and to move away from

1 the concept that they are a gratuity, the convention said  
2 we're going to call it a contract but not a contract in the  
3 sense of a contract but subject to the bankruptcy. I mean  
4 there was no -- there was no talk about bankruptcy, nor was  
5 there any talk about the contracts clause in this regard.  
6 They talked about this is going to be a contract that's in  
7 the concept of a solemn binding obligation that will be paid  
8 over time, so it is a contract. There's a contractual right,  
9 and it shall not be diminished or impaired, meaning it will  
10 be paid over time by the state and its political  
11 subdivisions. It is absolute. There is no -- there is no --  
12 as the attorney general's papers say themselves, there is --  
13 it's impermeable unlike the contracts clause, which has  
14 developed over time to say otherwise. Now, the difference is  
15 in part --

16 THE COURT: But how can the -- how can the state  
17 contract -- how can the state promise that given that under  
18 the federal Constitution it can't print money?

19 MR. GORDON: It's a matter of insuring that what  
20 dollars are available are devoted where they need to be  
21 devoted.

22 THE COURT: Suppose there's not enough then.

23 MR. GORDON: I don't know the answer to that  
24 question, your Honor, but that's not the issue we have here  
25 today. As I've told you, I think that there is enough money

1 here.

2 THE COURT: It's an important issue.

3 MR. GORDON: There is -- I'm sorry.

4 THE COURT: It is an important issue.

5 MR. GORDON: It's an important issue, but --

6 THE COURT: It demonstrates that there's a  
7 constitutional right there. It is stated there, but what's  
8 it worth? What's it worth? I mean Ms. Levine posed that  
9 question. What's it worth if the entity that has the  
10 obligation doesn't have the means?

11 MR. GORDON: First of all, I mean every situation is  
12 different.

13 THE COURT: Yeah.

14 MR. GORDON: Does it have the means today or will it  
15 have the means tomorrow, over time? Musselman, a state  
16 Supreme Court case, says, though, that the pension clause  
17 cannot be abrogated in the face of financial exigency.  
18 That's what it says. If there's a need to amend the state  
19 Constitution, then it needs to be amended, but it can't be  
20 abrogated by one branch of the government. The will of the  
21 people has spoken. The Constitution is a limit, and it  
22 circumscribes the power of the government. The government  
23 can't say, "Gee, we've got an exigency here. I guess we're  
24 going to ignore the state Constitution." It cannot do that.  
25 The contracts clause is different, and this is the point --



1 part of the point is there are contracts and then there are  
2 contracts.

3 THE COURT: Is there any other constitutional right,  
4 state or federal, that is that absolute, any other?

5 MR. GORDON: Sure.

6 THE COURT: And even freedom of the press has its  
7 exceptions.

8 MR. GORDON: Well, you know, if you look at even the  
9 attorney general's papers, you couldn't -- the legislature  
10 can't pass laws that would abrogate freedom of religion,  
11 freedom of speech, things of that nature, and it puts the  
12 pension clause on the same level. It is absolute in that  
13 regard. There are contracts, and there are --

14 THE COURT: We have laws that limit speech. Can't  
15 threaten the President; can't yell "fire" in a crowded  
16 theater. You can't commit libel.

17 MR. GORDON: So that maybe there's some regulation  
18 on the federal level, but this is a state issue. It is an  
19 issue that has been -- it is the will of the people of the  
20 state.

21 THE COURT: Even the contracts clause has its  
22 limits; right?

23 MR. GORDON: Contracts clause does. The reason is  
24 different, though. There are contracts, and then there are  
25 contracts. And if you look at, for example, you know, some

1 contracts fall under the contracts clause, but the pensions  
2 were determined to be different, and that's why you have a  
3 pensions clause. That's the whole point of it. The  
4 contracts clause recognizes that when you contract with the  
5 government, there is an inherent reserve police power to act  
6 in the public's welfare, and, therefore, to the extent  
7 necessary, in certain situations they can impair contracts.  
8 That's the contracts clause. Then you have the pensions  
9 clause. It doesn't say that it is subject to the contracts  
10 clause. It elevates pensions to a different level, and the  
11 reason is fairly clear. If you look at the Musselman case,  
12 in particular, again, Musselman says that Michigan  
13 governmental -- and I quote. This is from 448 Mich. 503  
14 where it talks about the pension clause being absolute and  
15 that it -- and it recognizes that the pension clause protects  
16 pensions for work performed, so I quote, "Michigan  
17 governmental units do not have the option, however, of not  
18 paying retirement benefits. Unlike highway construction or  
19 police protection, which a governmental unit can choose to  
20 receive less of, it is impossible to receive less service  
21 from the pensioner. The pension payment is payment for work  
22 already completed, or deferred compensation," end quote.  
23 What's being referenced there is the complete difference --  
24 the relationship between the public employer and labor is  
25 different than the relationship between the public employer

1 and a bondholder. A bondholder makes an investment. There's  
2 risk involved. That is understood, and that risk is factored  
3 into the pricing of the bond. A laborer has -- the  
4 relationship with the employer is different. The laborer  
5 works. The employer pays. And to the extent that part of it  
6 is deferred compensation in the form of a pension, so be it,  
7 but it's for -- but what the pension clause protects is  
8 accrued benefits.

9 THE COURT: Isn't there an argument that labor takes  
10 risks with its employer, too?

11 MR. GORDON: Not in the State of Michigan, your  
12 Honor, and I want to emphasize that. Michigan is only one of  
13 seven or eight states in the country that has this clause.  
14 This is unique to Michigan and the seven or eight other  
15 states involved.

16 THE COURT: Excuse me one second. I want you to  
17 ignore --

18 MR. GORDON: Oh.

19 THE COURT: No. I want you to ignore that yellow.  
20 My staff advises me that Ms. Levine didn't use seven of her  
21 minutes, so I'm going to yield them to you.

22 MR. GORDON: Thanks, Sharon.

23 THE COURT: So reset the clock at ten. I assume  
24 that's okay with you.

25 MR. GORDON: Yes, absolutely, your Honor. I can't

1 even remember where we were now. Where were we?

2 THE COURT: Oh, I'm sorry. I interrupted your train  
3 of thought. Well, take another minute to recollect --

4 MR. GORDON: Oh, yes. I think I finished that  
5 point, I suppose. It really is that, you know, some contract  
6 rights are just contract rights, and other contract rights do  
7 rise to the level of property rights, and that's in the  
8 United States Trust Company of New York versus New Jersey,  
9 the Supreme Court case, 431 U.S. 1. In Michigan AFT Michigan  
10 versus Michigan, 297 Mich. App. 597, the Court held that  
11 withheld salary of public school employees constituted the  
12 taking of property in violation of substantive due process  
13 and the takings clause, so there are relationships,  
14 contractual relationships relative to accrued benefits for  
15 labor, pension obligations, that are treated as property.

16 THE COURT: Is there a State of Michigan case that  
17 holds that pension rights are property rights?

18 MR. GORDON: Well, this relates to salary of public  
19 school employees. I don't know --

20 THE COURT: Right. So I was asking you about  
21 pensions.

22 MR. GORDON: About pension obligations specifically?  
23 I would have to check on that, your Honor, but I believe that  
24 there are pension cases in the state that talk about pension  
25 rights as property, including in such a situation, as you can

1     imagine, as divorce settlements. There are pension  
2     obligations that become property that get part of a property  
3     settlement even, but that's just one example, but I can get  
4     you --

5             THE COURT: Well, we have to be careful here because  
6     a contract right is in the bundle of property rights. Every  
7     contract is property of the parties to the contract; right?

8             MR. GORDON: Yes, your Honor. I'm not sure that all  
9     contract rights rise to the level if they're abrogated of a  
10    taking, but here vis-a-vis the pension --

11            THE COURT: Right. That's exactly the point.

12            MR. GORDON: That's right, but the pension clause --

13            THE COURT: So when the federal, you know,  
14    Bankruptcy Court discharges creditors' contract rights  
15    against debtors, which we do all day every day, we're not  
16    taking the creditors' property rights even though we are  
17    discharging those contracts or if we are it's not a Fifth  
18    Amendment violation; right?

19            MR. GORDON: True. By the same token, there are  
20    other property rights that are determined under state law  
21    that -- cases such as Butner and Travelers respect the state  
22    law property interest, and it flows through the bankruptcy.

23            THE COURT: Right, but the point is that it has to  
24    be a property right under state law over and above what would  
25    be the contract right, like, for example, a security

1 interest.

2 MR. GORDON: Or a state constitutionally protected  
3 right that is impermeable we would submit, your Honor.

4 THE COURT: Okay.

5 MR. GORDON: It's like a nondischargeable debt, your  
6 Honor, and it doesn't mean that it can't be dealt with in a  
7 way that doesn't impair it but gets dealt with in a way that  
8 is -- you know, provides some flexibility for the  
9 reorganizing entity, but it's a nondischargeable debt.

10 THE COURT: Well, nothing in Chapter 9 provides for  
11 any nondischargeable debts, is there?

12 MR. GORDON: I'm stating it by analogy, your Honor,  
13 obviously.

14 THE COURT: Okay. All right.

15 MR. GORDON: By putting the condition on that you  
16 can't impair, it becomes a nondischargeable debt essentially,  
17 and the state has that authority to place the appropriate  
18 conditions on the filing of the bankruptcy to protect the  
19 statutory structure. And it's not just statute. I mean this  
20 is -- the difference here again, this is really unique. It's  
21 not like California or Alabama.

22 THE COURT: Hypothetically, a state legislature  
23 passes a law authorizing municipalities to file Chapter 9 so  
24 long as the plan provide -- the municipality's plan provides  
25 for a priority of payment, and it turns out that that

1 priority of payment legislatively required by the state  
2 legislature is different from the Bankruptcy Code. Let's  
3 assume that. Would it be your position that no municipality  
4 could file Chapter 9 in that case because the state law  
5 contravenes the superior -- or the supreme federal law?

6 MR. GORDON: Well, that's an interesting question  
7 because it sounds more like one of those situations where  
8 once you're in bankruptcy, you have to accept the structure  
9 of the Bankruptcy Code itself, and that highlights --

10 THE COURT: That's exactly what the city is arguing  
11 here.

12 MR. GORDON: And that highlights the point here that  
13 eligibility has to be dealt with at the eligibility stage and  
14 that -- and to put off the question of whether you can impair  
15 the pension clause leads to those vagaries of questions  
16 about, "Well, now we're in bankruptcy. Does the Bankruptcy  
17 Code have vitality and in what regard?" No. You don't get  
18 to those questions unless you have valid state authorization.  
19 You don't have valid state authorization unless you've taken  
20 into account what provisions need to be there to protect the  
21 state Constitution and other statutes, and that's sort of  
22 what Harrisburg talks about. You may have facial authority  
23 under one statute, but you got to look at the other statutes.  
24 And in here in this case it's --

25 THE COURT: So in my hypothetical you would say

1 there's no valid authorization.

2 MR. GORDON: I would say that the state may be very  
3 disappointed if it authorizes and allows the debtor into  
4 bankruptcy only to find that the -- that part of the  
5 protection goes away.

6 THE COURT: It's hard for me to be concerned about  
7 how the state feels. Is it your position that there would be  
8 no authorization, no proper authorization in that case?

9 MR. GORDON: Let me understand the hypothetical  
10 then. I know time is short. The hypothetical is that the  
11 state would pass a statute that says that you can file  
12 Chapter 9, but the priority of payments is going to be --

13 THE COURT: But here are the priorities. Here are  
14 the priorities. You got to pay bonds first, and, you know,  
15 you got to pay --

16 MR. GORDON: Perish the thought.

17 THE COURT: Sorry?

18 MR. GORDON: Perish the thought, but go ahead.

19 THE COURT: Okay. Perish the thought all you like,  
20 but this is the hypo.

21 MR. GORDON: Yes.

22 THE COURT: You got to -- you pay the bonds first,  
23 and you got to pay trades, and then you got to pay employees'  
24 wages, and then you pay pensioners last, and understand,  
25 everyone who's listening to this, this is strictly



1 hypothetical. It's inconsistent with the Bankruptcy Code.  
2 I'm sorry.

3 MR. GORDON: I forgot about the overflow. Sorry.

4 THE COURT: Well, and this is being recorded.  
5 Anyway, it's inconsistent with the Bankruptcy Code. However,  
6 whatever hypothetical you create, and the governor says, you  
7 know, "We've got to comply with state law. I'm authorizing  
8 this bankruptcy, but the municipality's plan has to comply  
9 with the state law that sets forth these priorities." Is  
10 that a proper authorization or not?

11 MR. GORDON: I would say not.

12 THE COURT: Okay.

13 MR. GORDON: Well, it's --

14 THE COURT: Now you're saying that when state law  
15 says the priority has to be given to pensions --

16 MR. GORDON: Well, let me back up.

17 THE COURT: -- that's not proper if it's  
18 inconsistent with the Bankruptcy Code.

19 MR. GORDON: Actually, I would say -- no. I would  
20 say that the authorization is proper, but, again, a portion  
21 of that authorization is actually going to come into conflict  
22 with the Bankruptcy Code itself, so I think it's just a  
23 flawed concept. So if you had that provision in there, I --  
24 you know what? The difference is -- let me think about this.  
25 I think the difference is the cases such as Vallejo and

1 others dealt with situations where someone tried to cherry  
2 pick various provisions of the Bankruptcy Code after they got  
3 into bankruptcy. It didn't involve the actual state  
4 authorization. So here I think if you were presented with  
5 that, you would have two choices. You would either have to  
6 acknowledge that state authorization as is and agree to that  
7 structure and say that will supersede the Bankruptcy Code  
8 because that's the only way the state is allowing you to get  
9 into bankruptcy, or you would have to dismiss the case.

10 THE COURT: Which should I do?

11 MR. GORDON: In that situation, I think you would  
12 give the state the opportunity to decide, but in the first  
13 instance, if the state doesn't do anything, you would have to  
14 dismiss that case because you don't have the authority to  
15 amend the Bankruptcy Code.

16 THE COURT: I would have to give them the  
17 opportunity to revise the authorization?

18 MR. GORDON: That's correct, your Honor. They'd  
19 either have to amend the --

20 THE COURT: How could --

21 MR. GORDON: -- authorization or understand that if  
22 they go into --

23 THE COURT: How could the governor provide an  
24 authorization that's inconsistent with the state statute?

25 MR. GORDON: He couldn't. He would either have to

1 go back and --

2 THE COURT: What's there to revise?

3 MR. GORDON: -- change the statute -- he'd either --  
4 he has two choices.

5 THE COURT: Oh, go back and change the statute.

6 MR. GORDON: There are two choices. Either the  
7 Court agrees to allow the case to go forward with that  
8 structure because that's the only way the state will  
9 authorize it and that's what 109(c)(2) talks about, or if  
10 this Court for some reason believes that that is in conflict  
11 with the Bankruptcy Code, then this -- I guess I don't know.  
12 The state could either -- the state would have to go back and  
13 amend its statute in some fashion. I don't really know, but  
14 I think that if the state --

15 THE COURT: Or if it's constitutional, amend its  
16 Constitution?

17 MR. GORDON: Wait. What couldn't be done is that  
18 this Court could not accept the authorization and then say,  
19 "I'm cherry picking. I'm not allowing that part of the state  
20 statute to stand because that is the only way that they got  
21 into bankruptcy in the first place." That's my answer, your  
22 Honor. All right. Can I move on?

23 THE COURT: You can.

24 MR. GORDON: We're really out of time here probably,  
25 I notice, in a minute, but I just wanted to touch upon

1 collateral estoppel because I promised I would unless your  
2 Honor has a different --

3 THE COURT: No, no. You argue what you like.

4 MR. GORDON: As far as collateral estoppel is  
5 concerned, your Honor, the city and the state have argued  
6 that there was not a full fair opportunity to litigate in the  
7 Webster matter. We've addressed that in our papers. We  
8 believe that that is not accurate. There was full briefing.  
9 Both sides filed cross-motions for summary disposition, so  
10 they addressed the merits of the matter. The Court  
11 acknowledged that there had been briefing and oral argument  
12 before it entered its order. The city and the state also  
13 argued that there was no privity between the city and the  
14 defendants in Webster, but on September 19th, your Honor, the  
15 city argued in this court that there was a common interest  
16 agreement between the city and the state and that there was  
17 common interest with respect to the financial situation of  
18 the city and the bankruptcy, so privity is certainly there.  
19 And then finally the city and the state argued that the state  
20 court doesn't have authority or jurisdiction to rule on  
21 eligibility issues. The Webster court didn't rule on  
22 eligibility issues. It doesn't mention 109(c)(2) of the  
23 Bankruptcy Code. It merely ruled on the interplay between  
24 two state statutes, PA 436 and the pensions clause, and ruled  
25 that those two had to be harmonized and that, therefore, any

1 authorization of a bankruptcy under PA 436 must comport with  
2 the pensions clause or otherwise it was unconstitutional, so  
3 it did not infringe on this Court's jurisdiction in that  
4 regard. So we think that collateral estoppel is valid and  
5 applies here under the Webster judgment.

6 THE COURT: Thank you.

7 MR. GORDON: Thank you, your Honor.

8 MS. CECCOTTI: Good afternoon, your Honor. Babette  
9 Ceccotti for the UAW.

10 THE COURT: Good afternoon.

11 MS. CECCOTTI: And with admittedly some trepidation,  
12 I am also going to cover the authorization under state law,  
13 and I think -- I guess I'd like to start with just a couple  
14 of threshold comments. First, I think the exchange that  
15 you've had with Mr. Gordon and perhaps with others -- and I'm  
16 sure it's not going to be limited there -- will probably lead  
17 you to conclude that at least some of the issues that you've  
18 slated as purely legal will -- are better served awaiting the  
19 outcome of the trial. I'm just -- you know, Mr. Gordon took  
20 you through a series of numbers. There are all kinds of  
21 facts and information that are probably best developed  
22 through the evidentiary record, and that may well inform your  
23 Honor's views of a number of the questions that you've asked  
24 here today so far, so I'll just start with that observation.  
25 I'd like to just, if I might, also --

1 THE COURT: Well, just so the record is clear -- and  
2 I may have indicated this before even perhaps in writing --  
3 it's certainly not the Court's intention to rule on these  
4 issues before the trial, and to the extent any of the facts  
5 that come out at trial bear on these, sure, they'll be taken  
6 into account.

7 MS. CECCOTTI: Thank you, your Honor.

8 THE COURT: But I did hold out to all of you that  
9 one of the purposes of today's hearing was to see whether  
10 there are any genuine issues of material fact in advance of  
11 the trial so that you can address those at the trial, and I  
12 intend to do that.

13 MS. CECCOTTI: Thank you, your Honor. I guess  
14 the -- let me just interject another thought into the  
15 exchange that you had with Mr. Gordon on your hypothetical, a  
16 couple of thoughts. First, the -- and I will -- I'm going to  
17 start and go through this in a little more organized way, but  
18 I just wanted to make sure I get this point out. It's  
19 important to keep in mind that as inviolable and as absolute  
20 and as definitive as those of us on the objectors' side  
21 believe the pension clause is and as much as we believe that  
22 it was the right of the citizens of the Michigan -- of  
23 Michigan to so provide in adopting it, remember that we are  
24 here in the public sector. We are not in the private sector  
25 where there is a federally regulated and federally

1 established pension insurance system so that when plans get  
2 underfunded, when plan sponsors are overburdened, there is a  
3 system that takes over. And I would have to say all --  
4 certainly the lion's share of the decisions that have come  
5 down on this topic arise because of the -- because of the way  
6 that that system is constructed. There's a federal agency  
7 that provides a safety net. You know, there are moral hazard  
8 issues. There's a whole balancing that goes on in that  
9 system. We don't have that here. Michigan pensioners have  
10 Article IX, Section 24. That's it. That's what they have.  
11 So as, you know, perhaps a -- it might take a bit of a leap  
12 to see that that section means what it says and really,  
13 really, really means what it says, I think it's important to  
14 bear in mind that that is a safety net for pensions for  
15 Michigan pensioners. Okay.

16           So, now, to try to get back a little bit towards  
17 more of an organized progression here on the 109(c)(2)  
18 issues, the governor, as we've been discussing, had issued  
19 the letter of authorization -- the letter of authorization  
20 without any contingencies, so I think it's in -- and your  
21 Honor asked the question this morning -- a couple of  
22 questions this morning that have to do with, you know,  
23 where's the impairment and where's the harm and questions of  
24 that nature, and why wasn't the governor's reference to 943  
25 sufficient. So I think what's important to do first is take

1 a look at -- briefly just take a look at the authorization  
2 letters. And, again, this is without reference to any  
3 testimony or anything else that you're going to hear next  
4 week. You know, just looking at the letters that were  
5 attached to Mr. Orr's declaration, the July 16th  
6 authorization makes quite plain in his situational  
7 overview -- he says for an extended period of time, the city  
8 has simply failed to make the investments required to provide  
9 its residents with an adequate quality of life as limited  
10 resources have been diverted elsewhere. He says the city's  
11 urgent need to address large and growing legacy liabilities  
12 and other substantial debts is self-evident. Failure to  
13 address these liabilities will prevent -- excuse me --  
14 prevent the city from devoting sufficient resources to  
15 providing basic and essential services to its residents.  
16 Indeed, significant additional resources are required to  
17 improve health and safety. And he goes on to say that the  
18 city must devote a larger share of its revenues to  
19 effectively providing basic essential services to current  
20 residents, attract new residents and businesses to foster  
21 growth and redevelopment, ultimately begin -- and ultimately  
22 begin what will be a long process of rehabilitation and  
23 revitalization for the city. The city's debt and legacy  
24 liabilities must be significantly reduced to permit this  
25 reinvestment. Plain as day in Mr. Orr's letter. He



1 incorporates his entire proposal, the -- I don't have the  
2 whole thing here. I've just got some of it. This is the  
3 June 14th proposal. Goes to the governor, and the governor  
4 writes back again providing the authorization and saying in  
5 part that he's reaffirming his confidence that Mr. Orr has  
6 the right priorities when it comes to the City of Detroit. I  
7 am reassured to see his prioritization of the needs of  
8 citizens to have improved services. I know we share a  
9 concern for the public's -- for the public employees who gave  
10 years of service to the city and now fear for their financial  
11 future in retirement, and I'm confident that all of the  
12 city's creditors will be treated fairly in this process. We  
13 all believe that the city's future must allow it to make the  
14 investment it needs in talent and infrastructure all while  
15 making only promises it can keep. So I think it's very clear  
16 from these letters -- excuse me -- as it is abundantly clear  
17 from the proposal that the city is proposing to take  
18 resources from what it's calling the legacy liabilities or,  
19 fill in the blank, accrued pensions, and divert those  
20 resources to the list that Mr. Orr has laid out here,  
21 reinvestment and services and the like, so when we talk about  
22 not impairing the pensions and who took what action and when  
23 does the impairment happen, the governor's letter, we submit,  
24 in fact, is the impairment because it has -- the governor is  
25 stating that he is acknowledging Mr. Orr's priorities,

1 including the priorities to take money from the pensions and  
2 use them to pay other things. And so when the pension clause  
3 talks about -- excuse me. I'm sorry. I just lost my brief.  
4 I apologize, your Honor. I think I -- I have it. So when we  
5 talk about the text of Article IX, Section 24, "The accrued  
6 financial benefits of each pension plan and retirement system  
7 of the state and its political subdivisions shall be a  
8 contractual obligation thereof which shall not be diminished  
9 or impaired thereby," and we look and we are -- we see that  
10 among the records in the constitutional convention is the  
11 explanation that Article IX, Section 24, quote, "requires  
12 that accrued financial benefits of each pension plan and  
13 retirement system of the state and its political subdivisions  
14 be a contractual obligation which cannot be diminished or  
15 impaired by the actions of its officials or governing body,"  
16 the impairment occurs when the governor signs this  
17 authorization with no contingencies. That's when it happens.  
18 So not impairing thereby, meaning -- means very specifically  
19 this document, and the "this" I'm holding up here now is the  
20 governor's consent. Now, why is --

21 THE COURT: Oh, but this raises two questions.

22 MS. CECCOTTI: Sure.

23 THE COURT: Is there a scenario in which the city  
24 would have the ability to meet its pension obligations in the  
25 very long term unless it makes the kind of investments that

1 Mr. Orr and Mr. Snyder have suggested should be part of the  
2 city's priorities? That's question number one. Question  
3 number two is actually a much more important question, and  
4 that is is question number one a question for now, or is it a  
5 question for plan confirmation?

6 MS. CECCOTTI: It is absolutely a question for now  
7 because --

8 THE COURT: What's the answer then? How can the  
9 city maximize its chance of paying its pension obligations  
10 unless it makes the kind of investments that Mr. Orr and Mr.  
11 Snyder are talking about?

12 MS. CECCOTTI: It may be that the investments  
13 themselves or the idea for the investments is fine. The  
14 question is can it get there lawfully by taking money from  
15 pensioners? That is the question that the state Constitution  
16 answers by saying no. Now, as Mr. Gordon pointed out or as I  
17 think is evident from his presentation, there's a lot of  
18 numbers here, Judge. There were numbers in Mr. Orr's  
19 request, his July 16th request. You're going to hear an  
20 awful lot about those numbers and what they are and what they  
21 are not, so I would suggest that the notion that we somehow  
22 have already today, quote, no reasonable alternative in the  
23 words of PA 436 I would suggest very much should await your  
24 Honor's review of the evidence on all of that, so --

25 THE COURT: Okay.

1 MS. CECCOTTI: I realize it's a question that has  
2 been on your mind all day, but I really think unless you  
3 really want us up here freelancing numbers -- and you really  
4 don't -- that it is best to simply --

5 THE COURT: I'll grant you that one.

6 MS. CECCOTTI: Right; right. But I guess my point  
7 is the answer cannot be because the problem seems hard, we're  
8 just going to try to find a way to say perhaps that this  
9 language doesn't mean what it says because I think once you  
10 start down that road, you run into all kinds of problems.  
11 You run into the Chapter 9 dual sovereignty problems. You  
12 run into problems of who gets to decide what, right, whether  
13 this Court gets to construe Article IX, 24, to, in fact, say  
14 it can be invaded. These are problems that are simply too  
15 thorny -- certainly too thorny to start with, and maybe we'll  
16 see where your Honor is after the evidence.

17 Okay. So why isn't the reference to 943(b) enough,  
18 and I think -- and I think you've heard it, but just to say  
19 it again and hopefully crystalize it a bit, I think the  
20 governor assumed in wording the letter the way that he did  
21 that somehow this all gets sorted out, and I think that seems  
22 to be a lot of the presumption here, and I must say I am not  
23 in full company with those who say that once you cross the  
24 threshold of 109(c) using state law that somehow you can  
25 start, you know, running around employing federal supremacy.

1 I think that that -- we'd probably have a lot more  
2 conversations about that with a lot more time with a lot more  
3 specificity before we get there. We think -- and we spent a  
4 bunch of time on this in our brief, Judge, and given your  
5 handling of the Addison case you probably didn't need all of  
6 this, but our view is that you must look -- in order for  
7 Chapter 9 to be constitutional, you have to look at all of  
8 these pieces that import or give recognition to the state  
9 law. Just to take you back to another colloquy that you had  
10 with Mr. Gordon and why I think maybe that the Chapter 13  
11 example isn't a good fit here, 109(c) says that an entity may  
12 be a debtor under Chapter 9 if and only if such entity is  
13 specifically authorized to be a debtor under such chapter by  
14 state law. So while we're all here today obviously under  
15 109(c) and 109(c) is in the Bankruptcy Code and so you're  
16 right -- the law that must be applied is state law, and the  
17 Court decides whether -- you, the Court, you, the Bankruptcy  
18 Court, decide under 109(c) whether, in fact, the municipality  
19 is specifically authorized to be a debtor under Chapter 9 by  
20 state law or by a governmental officer empowered by state  
21 law. And so I think that that may help to distinguish the  
22 Sixth Circuit case that you discussed with Mr. Gordon, but it  
23 also points out that getting through the door is a state law  
24 question. 903 and 904 are obvious limitations on the Court's  
25 authority. 943 is a limitation on the plan. All of these

1 things work together, and I think your Honor's opinion  
2 actually in the Addison case on the motion to intervene was  
3 exactly right in recognizing the limitations not only of the  
4 Court's caution in addressing the questions precisely because  
5 of the questions that 903 -- the issues that 903 and 904  
6 import into the bankruptcy process, but another observation  
7 which takes me back to the letters and the taking of the  
8 money from the pensioners and putting it towards something  
9 else, which is, I think, your court -- your observation in  
10 that case that Chapter 9 is about debt adjustment and should  
11 not be overburdened I think applies very well here, too, and  
12 I think, again, when we get to the trial and the full array  
13 of the plan and everything else comes out and we start  
14 talking about that in the evidentiary context, I think that  
15 it is at least a question as to whether or not this issue  
16 that we're all talking about here is in a narrow sense debt  
17 adjustment or whether it is more than debt adjustment and  
18 whether that shouldn't inform the Court's caution in ensuring  
19 that the state law is being adhered to.

20 And I guess -- and I don't often get to the point of  
21 imploring at the podium. It's not always pretty, but I'm  
22 going to break my rule on this whole subject of where is the  
23 impairment. To me it's like a shell game. Okay. Under  
24 which of these cups is the impairment; right? Is the  
25 impairment -- I've told you where I think the impairment is;

1 right? I don't think the Court impairs. The debtor proposes  
2 the plan. Under Chapter 9 only the debtor can propose the  
3 plan. The debtor was supposed to have come up with something  
4 that passes muster to meet the 109(c) criteria in advance of  
5 getting to this point, and they --

6 THE COURT: Well, but the proposal of a plan, the  
7 filing of a plan which proposes to impair pensions doesn't  
8 result in the reduction of anyone's pension check any more  
9 than the filing of the case did.

10 MS. CECCOTTI: Your Honor, I --

11 THE COURT: That doesn't happen until the Court  
12 confirms it under law.

13 MS. CECCOTTI: And, your Honor, then why are we  
14 talking about it? Why are we talking about it?

15 THE COURT: Answer that question.

16 MS. CECCOTTI: If it hadn't been --

17 THE COURT: I'm having my issues with that very  
18 question. Why are we talking about it?

19 MS. CECCOTTI: We're talking about it because it's  
20 in their proposal. We're talking about it because it was in  
21 the authorization that went to the governor. We're talking  
22 about it because the governor clearly recognized it or at  
23 least recognized it sufficiently to draft the letter that he  
24 did. We're talking about it because despite weeks and weeks  
25 and weeks, no one has disabused the pensioners of the notion

1 that their pension rights are -- that they are intending to  
2 impair their pension rights. That's why we're talking about  
3 it. It simply does not -- here they are in Chapter 9; right?  
4 They're in Chapter 9. They've got the benefit of the  
5 automatic stay. They've gotten their stay against the pre-  
6 petition lawsuits. They want to have a bar date motion.  
7 They're getting all of the -- you know, all of the features,  
8 right, of Chapter 9. And the threshold question that has to  
9 be asked is can they be here, and the threshold question can  
10 only relate to the form in which they show up on the court's  
11 doorstep. And the form in which they show up on the court's  
12 doorstep is the June 14th proposal, which is abundantly clear  
13 on the subject of invading -- impairing accrued pensions.  
14 What else would the Court -- what else would we be dealing  
15 with? What else would your Honor be dealing with if not for  
16 the fact that they evidenced their plan?

17 THE COURT: I think the answer to that question may  
18 be the governor's authorization. He says we are here to  
19 adjust the city's debts in conformity with law.

20 MS. CECCOTTI: He says that at that end we do that,  
21 but what does it mean -- what is supposed to go on before we  
22 get there? It can't be that we have a sort of quasi eligible  
23 debtor going through all of the -- you know, using all of the  
24 processes I just described and then we have a big  
25 conflagration at the end. I mean it just --



1 THE COURT: Why not?

2 MS. CECCOTTI: Chapter 9 presupposes through the  
3 front door under state law, specially authorized under -- by  
4 state law. That is what 109(c) says. It is plain as day.  
5 And state law means state law, and it requires giving -- if  
6 they hadn't put in this -- the pages --

7 THE COURT: So in response to my question to Mr.  
8 Gordon, you would say that if state law requires a different  
9 priority scheme than the Bankruptcy Code, the municipality is  
10 eligible only if the Court is willing to enforce that state  
11 law priority scheme rather than the Bankruptcy Code priority  
12 scheme?

13 MS. CECCOTTI: I think that I would say that if a  
14 state legislature -- we're not talking about the Constitution  
15 here. You're just talking about, in effect, the PA 436 of  
16 whatever that state is. I would say that those are the  
17 terms. We have -- we allow the states -- states have a  
18 variety of authorization. Some of them have no  
19 authorization. It is a state-by-state --

20 THE COURT: Every bankruptcy case that has addressed  
21 that question has held the other way, hasn't it?

22 MS. CECCOTTI: Well, I don't know the answer to  
23 that, your Honor. In the Chapter 9 context?

24 THE COURT: Yes, in the Chapter 9 context.

25 MS. CECCOTTI: Okay. Well, I --

1 THE COURT: Every Bankruptcy Court has held once  
2 you're in the door, it's the Bankruptcy Code priorities that  
3 apply, not the state law priorities --

4 MS. CECCOTTI: Right. Well, right. And now we're  
5 getting into the --

6 THE COURT: -- because the state consents to the  
7 Bankruptcy Code or it doesn't.

8 MS. CECCOTTI: Well, and I would say that a state  
9 that passes a law such as your Honor proposed maybe, in fact,  
10 looked at those cases and said, no, we don't really want to  
11 go there. We want to -- you know, we'll let you go if it's  
12 this other way. I think the through the door -- once we're  
13 in the door -- I know what Harrisburg says. You know, I have  
14 a lot of trouble with it just because I think that the  
15 doctrine has not evolved in a sufficiently precise manner.  
16 You don't always see what the conflict is. You have to come  
17 up with notions of what the purpose is. Remember the ancient  
18 Supreme Court cases here said bankruptcy is about discharge;  
19 right? So can states have discharge laws? So we're way, way  
20 far away from that now, so I think -- again, I think we'd  
21 have to have a lot more conversations about what happens  
22 through the door. Right now we're talking about you're at  
23 the door, and you're at the door, and you're presenting  
24 yourself, and what you're wearing, right, is something that  
25 says we are going to violate Article IX, Section 24.

1           Just want to see if there is anything -- see if I've  
2 left anything out here that I wanted to cover. I have some  
3 minutes here. I guess I could barter away my minutes, Judge,  
4 or I could give them to you to barter them away. Let me just  
5 take a quick moment here. I think -- I mean, again, I think  
6 we're going to get to the point of duplication if I continue  
7 unless, your Honor, you'd like to ask me anything else. I  
8 think I've hit the points I wanted to hit.

9           THE COURT: Okay. Thank you.

10           MR. WERTHEIMER: William Wertheimer, your Honor, on  
11 behalf of the Flowers plaintiffs. As I'm sure your Honor  
12 will recall, although it seems like ages ago now, the Flowers  
13 plaintiffs were plaintiffs in one of the state court cases  
14 that preceded the bankruptcy, a state court case in which we  
15 were making the claim that under state law the governor was  
16 required to recognize Article IX, Section 24, if and when he  
17 authorized a bankruptcy. I'm not here to speak on bankruptcy  
18 law. When I heard the reference to Asbury Park, I thought of  
19 the street in northwest Detroit. I'm not a bankruptcy  
20 lawyer.

21           THE COURT: Okay.

22           MR. WERTHEIMER: I just want to speak briefly on the  
23 state law, which it was my understanding at the stay  
24 proceedings everybody kind of understood, including the city  
25 attorneys, that although our claim was being delayed, it was

1 not being changed in terms of its nature; that is, that this  
2 Court would decide as a matter of state law whether this  
3 bankruptcy was properly authorized. It was just that the  
4 forum was changing.

5 And I'd just like to make three points as to that  
6 state law, three areas where I think this Court can look to  
7 what it should do in deciding what I believe is that state  
8 law issue; that is, the basic eligibility issue. If you look  
9 at the equivalent of legislative history of Article IX,  
10 Section 24 -- that is, the constitutional convention  
11 record -- there is certainly references to the fact that has  
12 been mentioned here today that it was meant in part to deal  
13 with the fact that pensions had been considered not to be a  
14 matter of contract, but the only specific reference that I  
15 found in that record -- and no one has cited anything to the  
16 contrary -- is the comment of Mr. Van Dusen, which I -- with  
17 the Court's permission, I'll take the liberty to quote. It's  
18 not long. "An employee who continues in the service of the  
19 public employer in reliance upon the benefits which the plan  
20 says he would receive would have the contractual right to  
21 receive those benefits" -- he didn't stop there -- "and" --  
22 he didn't say "meaning" -- he said "and," in addition -- and  
23 I think this goes to what Mr. Gordon was getting at, "and  
24 would have the entire assets of the employer at his disposal  
25 from which to realize those benefits." That was the

1 understanding of Mr. Van Dusen. There's no contrary  
2 understanding on the record as to what the idea was on behalf  
3 of the people who were writing Article IX, Section 24.  
4 That's point number one, and I think if you look at what  
5 Emergency Manager Orr did in his June 14th proposal, Mr. Van  
6 Dusen, were he alive to take a look at it, would say, "That's  
7 not what I meant," because on June 14th what Mr. Orr proposed  
8 and he continues to propose is the retirees get treated like  
9 any other creditor. He didn't say words to the effect of  
10 "all the assets of the employer," so that's the first piece  
11 of state law in the broad sense of the term that I think you  
12 can look to.

13           The second piece is the Webster and the Flowers  
14 cases and the retirement case. And I'm not repeating  
15 Mr. Gordon's argument relative to collateral estoppel or the  
16 res judicata argument. I'm simply pointing out that as --  
17 excuse me -- as Mr. Gordon indicated, that case was fully  
18 briefed, and a state court judge looked at the exact issue --  
19 well, maybe not exact but very close to the issue that is in  
20 front of you, and that state court judge, after full  
21 briefing, decided that in a manner consistent with our  
22 position. And I would point out there is no contrary law  
23 anywhere. I recognize this Court -- the cases that say you  
24 look to the definitive ruling from the highest state court  
25 and all that, but Judge Aquilina's decision -- decisions,

1 well-reasoned, are all that's out there. She's a state court  
2 judge deciding this issue. That's the second piece of state  
3 court law that, as far as I can tell, is out there.

4           There's one other, and that is we have the state  
5 attorney general. This isn't law, but the state attorney  
6 general enters an appearance a little late in the game. The  
7 governor has already authorized the bankruptcy. However, the  
8 state attorney general, as an officer of the state, as the  
9 chief legal officer of the state, tells this Court that  
10 Article IX, Section 24, binds the emergency manager in  
11 bankruptcy. Now, we all know that that gets into the issue  
12 of is it at the eligibility stage or the plan stage, and I --  
13 that's been dealt with. My point is simply that a state  
14 officer, the attorney general of the state, saying that the  
15 emergency manager in bankruptcy is bound by Article IX,  
16 Section 24, is consistent and supports our position that the  
17 governor, when he goes to authorize that bankruptcy, is also  
18 bound by Article IX, Section 24. And with all due respect to  
19 the governor, we think it's up to this Court to hold the  
20 governor to that.

21           THE COURT: All right. Thank you, sir.

22           MR. WERTHEIMER: Thank you.

23           MS. PATEK: Good afternoon, your Honor. Barbara  
24 Patek on behalf of the Detroit Police Command Officers  
25 Association, the Detroit Police Lieutenants & Sergeants

1 Association, the Detroit Police Officers Association, and the  
2 Detroit Fire Fighters Association defined in this case as the  
3 Detroit Public Safety Unions. As the Court is aware, these  
4 are the men and women who provide the police and fire  
5 protection that are essential to the survival of the city,  
6 and these are exactly the essential services that Chapter 9  
7 was designed to preserve and protect.

8 I want to use my time this afternoon to talk a  
9 little bit about ripeness, talk very briefly about the  
10 supremacy clause and the tension between the supremacy clause  
11 and the Tenth Amendment, and then to try to answer some of  
12 the questions that the Court has raised with some of the  
13 other objectors today.

14 On the issue of ripeness and why this is a question  
15 for eligibility, I think that goes to the very nature of  
16 Chapter 9, which precisely because of the sovereign immunity  
17 and the sovereignty of the State of Michigan, this Court, as  
18 it's recognized in so many hearings, is limited in what it  
19 can order the city to do. In that respect, this -- not that  
20 every bankruptcy isn't a consensual process and not that  
21 every bankruptcy doesn't involve a lot of negotiating.  
22 Chapter 9 is unique because it incorporates -- it's a largely  
23 consensual process at some level precisely because this Court  
24 cannot trump the state's sovereignty in particular  
25 situations. And in that regard, if one talks about imminent

1 harm, there is -- you know, it's in the record. Mr. Gordon  
2 alluded to the fact that the stay authorized the city to come  
3 in this court for a very public purpose, and that purpose was  
4 to impair the accrued vested pension rights of its public  
5 servants. That question, as the city points out in its  
6 papers, no court has ever said they can't do it, and no court  
7 has ever said they can. It's an unanswered question. We're  
8 entitled to know what our rights are, and to suggest that by  
9 knowing what our rights are in the door that is to knowing  
10 what -- to know what the proper authority is here would  
11 somehow skew the process or cause people to walk away from  
12 the table I think is wrong. This is a hard question that the  
13 Court has to answer, but the Court is here to follow the law.  
14 I think this is -- there is imminent harm to these  
15 individuals here, and there's a second piece of that by  
16 virtue of the vacuum in which there's no legal precedent on  
17 this issue, and that is -- I'm just going to throw out to the  
18 Court the idea that this is one of those issues where it's  
19 capable of repetition but evading review. If every time this  
20 gets kicked down the road to confirmation, nobody is ever  
21 going to know what their rights are when this issue comes up.  
22 I submit that Michigan is a little bit unique, but I think  
23 that there are plenty of reasons that this issue is ripe for  
24 adjudication today.

25 I'd like to take a crack at some of the questions



1 that the Court raised. You raised the issue of what if the  
2 state law requires a different scheme of priorities than is  
3 authorized by the Bankruptcy Court. I think if you step out  
4 of the weeds on that question and I think you look at what  
5 the Code says here, the state has to give its consent to come  
6 into Chapter 9. And in giving its consent, the state agrees  
7 to certain provisions of Chapter 9. I think a state that  
8 authorizes such a scheme simply can't give its consent to  
9 come into Chapter 9. I think that's the simple answer to  
10 that question.

11 THE COURT: So your answer then in that hypo would  
12 be not eligible?

13 MS. PATEK: Correct. I also think -- the Court  
14 asked the question and raised the 11th Amendment, and I'm  
15 going to go out on a limb here on this and the question of  
16 sovereign immunity because I think the answer to a lot of the  
17 issues before the Court and whether or not, in fact, the city  
18 can impair these rights or use the Court to impair those  
19 rights is in some ways answered by the Code. Section 106 of  
20 the Code addresses the sections of the Code under which the  
21 state waives its sovereign immunity. 109 is not one of them,  
22 and I think that makes the eligibility issue as it's framed  
23 by 109 a question of state law. And the other place, if  
24 we're going to jump ahead to where we'll be down the road,  
25 where the state does not waive its sovereign immunity is

1 under Section 943. We know there are some places where to  
2 consent to come into this Court and get relief the state has  
3 to agree to conform to the rules. 365 is one of those that  
4 you've got Bildisco. If you're going to come in and you look  
5 at -- that's a place where the state has to agree, consent to  
6 be governed by the federal rules. The other place is the  
7 automatic stay. But when you get down the road to the plan  
8 that only the city can propose, the state does not waive its  
9 immunity, and that --

10 THE COURT: I think you might be overanalyzing my  
11 question about sovereign immunity. I was only analogizing to  
12 the 11th Amendment cases that hold that the issue of whether  
13 sovereign immunity is waived is a federal issue, not a state  
14 issue. I didn't mean to suggest, as you appear to understand  
15 here, that there is -- that there are 11th Amendment issues  
16 in this case.

17 MS. PATEK: I'm not suggesting that you are, your  
18 Honor, but I'm suggesting that -- and this sort of brings us  
19 back to where Ms. Levine started out this morning with this  
20 concept of -- this very basic concept, and one of the things  
21 that makes this case so hard and one of the things that all  
22 the commentators agree makes Chapter 9 so hard is this  
23 tension. We have a federalist system. There are rules of  
24 the road that were set up by the founders. We have a limited  
25 system of federal government. All the other powers are

1 reserved to the states and the individuals. And there's no  
2 question that wasn't done so that we could have big and  
3 powerful states. That was done by the founders so that the  
4 individuals close to the ground would have their rights  
5 preserved, and I think within the structure of Chapter 9 and  
6 within the limits of the Tenth Amendment, that the state  
7 simply cannot use Chapter 9 to impair an express  
8 constitutional promise. And I want to talk about that issue  
9 for just one moment. This pensions clause is in a very  
10 unusual place. Okay. This is -- I think it's fair to say --  
11 you talk about there is a contracts clause in the state  
12 Constitution just like there's a free speech clause and there  
13 are a lot of things that mirror the Bill of Rights, but, as  
14 Ms. Levine told us this morning, if somebody is violating my  
15 free speech rights, I'm not in state Circuit Court. I'm  
16 looking to the federal courts and the federal government to  
17 protect those rights. If you're talking about fiscal  
18 management, then that's a state issue, and in this case this  
19 state and the people of this state chose to enshrine that  
20 right to vested accrued -- this isn't all pension benefits,  
21 this isn't future benefits, just what people have already  
22 earned -- in its state Constitution and say those cannot be  
23 impaired.

24           The Court asked the question about what if there's  
25 not enough money, which sort of brings me back to the first

1 issue I was talking about. This Court has to rule on the  
2 legal issue that's before it, and if there's not enough money  
3 just like if you're in a Chapter 11 that you don't want to  
4 see liquidation, that's a hard question that the creditors,  
5 including the pensioners, including my clients, have to  
6 answer along with the city and try to solve this problem  
7 within the limits of Chapter 9 because if we don't solve the  
8 problem, the only remedy is a dismissal.

9 THE COURT: Well, I guess even that answer troubles  
10 me because if the Court holds here that there is this pension  
11 right that cannot be impaired and because the governor didn't  
12 condition this filing on the city recognizing that right in  
13 the bankruptcy, what would happen upon dismissal? There'd be  
14 this court holding that there's this unconditional absolute  
15 right not to have pensions impaired. On behalf of your  
16 retirees, you couldn't negotiate that, could you? How could  
17 you?

18 MS. PATEK: I can't negotiate that upon my retirees,  
19 but I suggest to the Court there is a solution to this  
20 problem, and the solution is for the city to come back again  
21 and to authorize -- have the state authorize the filing  
22 within the confines of the Constitution, and we move forward  
23 on that basis. I don't -- I understand that this has -- you  
24 know, we talk about the elephant in the room, but the larger  
25 part, the healthcare benefits, are not protected, and the

1 city has already said effective yesterday -- and these aren't  
2 my clients, but -- we're done providing that. It's a  
3 significant claim. I don't want to minimize that, but I  
4 think it is something, given our constitutional structure,  
5 that has to be dealt with in the confines of these  
6 proceedings, and there are negotiations. There's a huge  
7 consensual component to this, and that doesn't stop if the  
8 Court rules the way that we've asked to rule.

9 I see my time is up. I just want to wrap up very  
10 quickly, and I guess I would say we came into court on the  
11 first day, and we supported the city, and we've supported the  
12 city in many respects throughout this. We agree that there  
13 should be the stay. There has been the breathing space. But  
14 I think this is a hard, difficult question. As Ms. Levine  
15 said, democracy is hard. This restructuring plan has to be  
16 devised in accordance with applicable law, and the city on  
17 the front end has to agree that it's going to -- it's going  
18 to do so, and in the absence of that, I think they're not  
19 eligible. Thank you, your Honor.

20 THE COURT: All right. Thanks to each of you.  
21 We'll take our afternoon break now and reconvene at 3:20, a  
22 half an hour from now, for the city's arguments.

23 THE CLERK: All rise. Court is in recess.

24 (Recess at 2:50 p.m., until 3:20 p.m.)

25 THE CLERK: Court is in session. Please be seated.

1 Recalling Case Number 13-53846, City of Detroit, Michigan.

2 THE COURT: And it looks like everyone is here.

3 MR. BENNETT: Good afternoon, your Honor.

4 THE COURT: Mr. Bennett, you may proceed.

5 MR. BENNETT: Good afternoon, your Honor. Bruce  
6 Bennett of Jones Day on behalf of the city.

7 THE COURT: The only thing I would ask of you, sir,  
8 is to leave enough time before our closing time today for me  
9 to ask some questions of Mr. Todd. Doesn't need to be now.  
10 It can be whenever it's convenient for all of you.

11 MR. BENNETT: Okay.

12 MR. TROY: Mr. Troy, your Honor.

13 THE COURT: Mr. Troy. I'm so sorry, sir. And so I  
14 want to do that today because I'm not sure what his travel  
15 plans are.

16 MR. BENNETT: Okay. Your Honor should feel free to  
17 interrupt me if you think I'm getting too close to the end.  
18 And I actually have one procedural question that I'd like to  
19 get settled, too, which really has to do with whether you're  
20 expecting or would benefit from oral argument at the  
21 beginning of the next -- opening argument at the beginning of  
22 the next phase because that's -- so I don't know if --

23 THE COURT: You mean tomorrow?

24 MR. BENNETT: No. On the evidentiary phase  
25 beginning next week.

1 THE COURT: Oh, well not so much oral arguments as  
2 opening statements.

3 MR. BENNETT: Opening statements is what I mean.

4 THE COURT: Yes.

5 MR. BENNETT: Okay. Great.

6 THE COURT: Yes. I think opening statements are  
7 very important.

8 MR. BENNETT: Okay. I want to start with some  
9 general comments, some of which are designed to respond to  
10 things that came up this morning and some of which I think  
11 just help, I think, set the stage for what at least the city  
12 believes is happening in this Chapter 9 case. And I want to  
13 start by saying that the purpose of the Chapter 9 case is to  
14 adjust the city's debts, and that means all of their debts,  
15 obligations evidenced by bonds, obligations under other  
16 contracts, obligations to provide healthcare, and pension  
17 obligations. And so that there isn't any confusion, there's  
18 been a lot of reference to statements that were made. I  
19 think the statement most cited and the one that I think is --  
20 it's the same as all the other ones that have been made -- is  
21 that there must be -- the statement was there must be  
22 significant cuts in accrued vested benefits. It's been cited  
23 often, and it's true.

24 I want to make a couple of clarifications. I don't  
25 think anyone for the city ever said we were going to

1 eliminate pensions. This has been about the underfunding  
2 amounts. It is the underfunding amounts that are problems.  
3 I think your Honor understands that, but I think it's  
4 important to remind everybody else that we've never said that  
5 the objective is to eliminate pensions. The objective is to  
6 address the underfunding situation.

7 Now, why did we make that statement? The  
8 statement --

9 THE COURT: Well, let me just put it right to you.  
10 Is it your intent to propose a plan to reduce pensioners'  
11 monthly checks?

12 MR. BENNETT: To be very technical about it, what we  
13 have -- what we have -- what we have noted is that it is  
14 impossible for the city to fill the underfunding gap in the  
15 existing pension trusts, and we have also said that likely  
16 requires changing the amounts of pension benefits. Now --

17 THE COURT: By "changing," you mean reducing?

18 MR. BENNETT: Reducing. Now, I do want to -- I'm  
19 going to skip a couple points and then come back.  
20 Notwithstanding the fact that the Chapter 11 case has been  
21 filed, it remains the city's hope that these adjustments will  
22 be achieved on a consensual basis pursuant to agreements  
23 reached with the holders of the obligations. That is still  
24 the objective. And, of course, we are participating in  
25 mediation that's intended to facilitate that goal, and,



1 frankly, we'll meet with anyone anyplace anytime to try to  
2 achieve that goal. And we're going to discuss at certain  
3 points certain statements that have been made by others in  
4 this case about this problem which may suggest that those  
5 discussions are going to be particularly difficult, but I  
6 want there to be absolutely no confusion about where the  
7 city -- where the city stands on this.

8           And by the way, the filing doesn't say how  
9 ultimately this case is going to end, whether it's going  
10 to -- whether we're going to have a consensual plan, whether  
11 we're going to have a nonconsensual plan, whether it'll be  
12 partly a consensual plan or partly a nonconsensual plan. And  
13 although the city did make a proposal that certainly  
14 contemplated cuts to the underfunding obligation and  
15 ultimately to benefits that absolutely is a part of the June  
16 14th proposal, it was a proposal in an out-of-court  
17 negotiation, and I want to submit -- and we're going to come  
18 back to this point later -- it can't possibly be  
19 impermissible to ask to reduce benefits, particularly when  
20 you can demonstrate a need to do so. And so far, frankly,  
21 that's what the city did pre-petition, and so far that's what  
22 the city has done post-petition. We haven't filed a plan  
23 yet. It will come soon. And there has not been a request  
24 for cramdown, so -- and I think as we get into other parts of  
25 the argument -- the fact that we don't quite know what's

1 coming later may have some bearing on some of the legal  
2 points that your Honor has talked about and that others have  
3 talked about earlier today.

4 THE COURT: Is it the city's position that the State  
5 of Michigan does not have the obligation under the Michigan  
6 Constitution to guarantee the city's underfunding?

7 MR. BENNETT: I don't know if the city has a  
8 position. I will tell you that I have read all of the  
9 materials probably more than anyone else in the city's team,  
10 and I don't think the state has an obligation to guarantee  
11 the pension obligations of a municipality. I think actually  
12 when you look at the --

13 THE COURT: Isn't it in the city's best interest to  
14 say that -- or to assert that the state does have that  
15 obligation?

16 MR. BENNETT: I don't know whether it is or is not  
17 in the city's best interest to even take a position on that  
18 point, and that's why I said I don't think the city has a  
19 position on that point, but I have done a lot of the work,  
20 and I think I've made up my own mind as to what I think is  
21 there. I do think it's in the city's position that if we  
22 could get money from the state, we would want it, and it  
23 would be a great thing, and I'm reasonably certain that that  
24 sentiment has been expressed on more than one occasion.

25 THE COURT: Well, is there any reasonable prospect

1 that the state will comply with that request in the absence  
2 of a legal obligation -- a determined legal obligation?

3 MR. BENNETT: I don't know the answer to that  
4 question. Thus far the state has been of the view that the  
5 city has to reorganize based upon its own financial  
6 resources.

7 Okay. The next point I wanted to touch on is the  
8 fact that there are a large array of state and federal  
9 statutes that say in all kinds of different ways that the  
10 city is obligated to pay its debts. In fact, they say that  
11 the city is obligated to pay its debts in all kinds of  
12 different ways. And the city itself and the state has no --  
13 and we'll get into this in much more detail -- no ability in  
14 order to overcome those laws or very, very, very limited  
15 ability to overcome those laws. One important point about  
16 them that didn't --

17 THE COURT: You mean comply with those laws?

18 MR. BENNETT: No. To overcome them to get past them  
19 if they can't pay all of their obligations. And, again, it's  
20 a situation that the city is going to prove it's in, but  
21 that's for another hearing. The point I wanted to make here  
22 that I don't think was made earlier today was that a lot of  
23 these priorities collide with each other in all kinds of  
24 different ways. We heard, by the way, about the all assets  
25 at their disposal comment that was, I guess, from the

1 constitutional convention. Assuming for a second that that  
2 is what was intended, the problem is is that the legislature  
3 has also passed a law that describes certain debts -- the  
4 obligation to pay certain debts as a, quote, "first budget  
5 item," close quote. I don't remember the rest of the  
6 sentence, but those words are there. There's also other  
7 state statutes that don't actually grant a lien but that say  
8 proceeds of certain things must be used in certain orders to  
9 pay. And when you sit down and try to figure out in any  
10 environment where you don't have enough, how do you fit all  
11 these different things together, you run into a problem very,  
12 very, very quickly. And these are the provisions, by the  
13 way, that are protected by the federal contracts clause and  
14 also by the Michigan contracts clause because many of these  
15 provisions are in ordinances or resolutions that form part of  
16 bond contracts, and others are in ordinances and resolutions  
17 that form part of employment contracts. So you wind up -- if  
18 you look at the world before you even start talking about  
19 bankruptcy, you don't just have coherent commands, this is  
20 how you pay and this is how you go about doing it and  
21 everything works, you have a whole bunch of priorities that  
22 actually don't work, and this, frankly, is --

23 THE COURT: Well, but the objecting parties say all  
24 of those contract obligations that have protection merely  
25 under the contracts clause, federal or state, can be adjusted

1 consistent with state and federal law, but the pension  
2 obligation under the state Constitution is inviolate.

3 MR. BENNETT: And we'll get to that if you'll give  
4 me a chance. I will explain why --

5 THE COURT: Okay.

6 MR. BENNETT: -- they are, in fact, no different,  
7 but I guess my point here is that outside of bankruptcy, you  
8 have a -- you don't have coherence, and this is really to the  
9 whole point of does it really make any sense to have a rule  
10 that says if the state conditions its filing a proceeding  
11 based upon complying with its priorities, what do you even  
12 have. And in many circumstances, you have something that is  
13 just not meaningful in the context of where there's not  
14 enough to go around. I think that's the narrow point for the  
15 time being. We will generalize when we get to the whole  
16 issue of how the --

17 THE COURT: Okay.

18 MR. BENNETT: -- different clauses work. I also  
19 want to say that contrary to the papers that were filed --  
20 and I'm now referring to the UAW's papers -- the June 14th  
21 proposal didn't take broad aim at the city's workers and  
22 retirees. It was very, very carefully drafted to try to  
23 treat as many classes of creditors the same as we possibly  
24 could denying preferences to any except in cases where we  
25 were legally compelled to provide them. We thought and the

1 emergency manager thought that that was the best way to go  
2 about the problem that confronted us, and, of course, we're  
3 not under any illusion that that's going to be the last word  
4 on this question. There will be negotiations. There will be  
5 a plan filed, which I'm certain will differ from the proposal  
6 that was issued on June 14th in part to respond to creditor  
7 input, and it will be subjected to enormous and exacting  
8 procedures by this Court before it is ever confirmed.

9 I also want to spend just a second about the point  
10 that was made using some of the letters, the letters that  
11 were exchanged between the emergency manager and the  
12 governor. If your Honor hasn't already, I commend you to  
13 read all of them, not just the parts that were quoted. I  
14 think it's -- I think to fairly summarize the points made in  
15 both letters, the city has been -- the city services, city  
16 residents, the ability of the City of Detroit to be a city  
17 that provides adequate services to its residents has  
18 gradually been lost as a result of the constant and  
19 consistent diversion of current tax revenue paid by current  
20 tax revenue to legacy liabilities, including but not limited  
21 to pension claims. That is the problem. It is not as if  
22 everything is fine, let's take some money from pensioners and  
23 put it to the benefit of residents to make things better.  
24 The diversion already occurred. State law has been followed.  
25 Pensions have not been impaired or diminished. A consequence

1 has been that the resources available for services, that the  
2 resources available for investment have, in fact, been  
3 significantly impaired and significantly diminished to the  
4 point that lots of the city's infrastructure is no longer  
5 serviceable, thus the reference to need for investment. It's  
6 not for the new and wonderful. It's to put back things that  
7 really need to be updated and, in fact, replaced because  
8 they're worn out, and it's to restore budgetary items,  
9 budgets that have, in fact, been cut too great. And I think  
10 that sense -- if you read the entire document, you will see  
11 that that is the historical view of the current situation.  
12 Again, it will be proved next week. And the solution is in  
13 part a reinvestment program. Again, just to be technically  
14 correct, it's 1.25 billion over ten years, not over five  
15 years. Five years would be better. I don't think anyone  
16 thinks we can afford it.

17 I think the next point and the last point I'm going  
18 to make by way of introduction is really to address one of  
19 your Honor's questions, which is what happens if the city  
20 can't adjust its debts. I think we have to start with the  
21 following. Most business owners and residents are smart  
22 enough and sophisticated enough to figure out that it's a  
23 problem to be the highest -- residents of the highest taxed  
24 jurisdiction in the State of Michigan where somewhere between  
25 42 and 65 cents of every dollar is spent on something other

1 than services to current residents. That is not a stable  
2 situation. That is just not going to work out well. The  
3 consequence will be continuing declines in revenue. It may  
4 be that debts of all kinds would be paid for awhile, but  
5 ultimately debts of all kinds will not be paid, and no  
6 provision of any Constitution will change this. Thus, the  
7 stakes are very high not just for the city but also for its  
8 residents and its creditors, and I think that puts a very  
9 sharp point on your Honor's question about what is a  
10 constitutional provision worth when you're confronting an  
11 economic crisis such as this.

12 Unless your Honor wants to hear much about it, I was  
13 next going to talk about your jurisdiction to decide the  
14 eligibility question, but no one else raised it on oral  
15 argument, and since it wasn't raised on oral argument, I'll  
16 leave it to the papers unless your Honor has any particular  
17 questions with respect to that point.

18 THE COURT: No.

19 MR. BENNETT: And I'd like to take the same  
20 prerogative that if I intentionally pass over a topic because  
21 it wasn't covered today, if it's in our papers, we still care  
22 about it.

23 THE COURT: Of course.

24 MR. BENNETT: I'm just going to try to use time  
25 wisely. So the first place I'm going to spend some time is



1 on the constitutionality of Chapter 9, and I'm going to do it  
2 a little bit differently because I think, frankly, if we do a  
3 really careful look at Bekins -- and I'm going to call it  
4 Bekins because it's a really big company in California that  
5 has -- the name is spelled B-e-k-i-n-s, and everybody calls  
6 it Bekins, but I don't know what the correct pronunciation in  
7 this particular case is concerned. A very careful analysis  
8 of Bekins -- and believe it or not, the Cardozo dissent in  
9 Ashton is going to provide us with the guidepost to answer a  
10 lot of the questions that may not be constitutional questions  
11 but that ultimately are resolved by those cases. First, I  
12 have to say because it's important that it isn't this Court's  
13 place to overrule Bekins. Bekins has been the law for lots  
14 of years. And as the U.S. Attorney pointed out, it's not  
15 only that Bekins hasn't been overruled, it's actually never  
16 been challenged or questioned or otherwise suggested to be  
17 worthy of reconsideration by anything that the Supreme Court  
18 has done. And, moreover, in all of the discussion that your  
19 Honor heard about why Bekins should not be regarded as good  
20 law anymore, no one actually said that the -- that Chapter 9  
21 has been changed in any material way from the law that was  
22 before the Court in Bekins, and that's because in all the  
23 ways that mattered it really hasn't changed, not just -- not  
24 by a little but really not at all. However, we don't want  
25 the Court to write an opinion that says, well, you feel

1 constrained not to overrule Bekins. You think it should be  
2 overruled. So I'm going to spend some time talking about why  
3 Bekins is absolutely right and why Asbury Park and anything  
4 else didn't change anything.

5 Let me start with just a quick word on Asbury Park.  
6 Even to the Supreme Court, if you read their own words,  
7 Asbury Park is kind of considered an outlier. It has -- the  
8 Supreme Court has never since approved a municipality's  
9 modification of its own contract on the basis of emergency or  
10 anything else. Every time it's been asked to, it's basically  
11 talked about Asbury as being, number one, confined to its  
12 facts and extraordinary situation and not reflective of a  
13 broad doctrine. This same argument was made to Judge Bennett  
14 in the Jefferson County case, and he commented on it. I  
15 think we've cited to that case in our papers. He does an  
16 even better job than I just did of explaining why Asbury is  
17 an outlier. It doesn't provide much comfort to any  
18 municipality thinking it's going to modify its debts without  
19 the help of the Bankruptcy Code and is no good reason to  
20 reconsider Bekins.

21 Now, the next thing I want to talk about is what  
22 Bekins really does, and the -- a reality that you can find in  
23 Bekins if you're looking really hard, but unfortunately you  
24 have to look really hard, is that there were two  
25 constitutional provisions at stake when the Chapter 9's

1 predecessor was subject to Supreme Court review. One was the  
2 Tenth Amendment, and some people have talked about that. And  
3 the second part was the contracts clause. And when you read  
4 Bekins, the Court kind of touches on all the different  
5 features that matter but isn't particularly careful about  
6 matching up which features were needed to overcome which  
7 constitutional problem. And, frankly, in there we're going  
8 to find the answers to a lot of the -- a lot of the other  
9 questions that come up in this case.

10 So let's start with the Tenth Amendment. Of course,  
11 the Tenth Amendment, if you quote the whole thing -- and when  
12 your Honor confronted earlier, I'm not sure the first six or  
13 so words were quoted, "powers not delegated to the United  
14 States by the Constitution, nor prohibited by it to the  
15 states are reserved to the states respectively, or to the  
16 people." For starting purposes, "powers not delegated to the  
17 United States" are important words, and one of the things  
18 Bekins very clearly says is uniform laws on the subject of  
19 bankruptcies are delegated to the United States and that laws  
20 on the subject of bankruptcies include municipal debt, and I  
21 think they used "composition" as opposed to "adjustment," but  
22 composition statutes. So it's actually not a close call that  
23 the -- at least as far as the Supreme Court is concerned --  
24 and I think that's all that matters for this purpose is that  
25 we're going to have a municipal Bankruptcy Code that at least

1 covers subjects of bankruptcy and that those are clearly  
2 federal functions. Where a Bankruptcy Code applicable to  
3 municipalities --

4 THE COURT: Well, but we know from several Supreme  
5 Court cases that the mere fact that Congress legislates  
6 within its authority does not necessarily by itself mean that  
7 it's consistent with the Tenth Amendment.

8 MR. BENNETT: Well, actually I think --

9 THE COURT: Right? You've got Printz --

10 MR. BENNETT: Well --

11 THE COURT: -- in New York at a minimum that hold  
12 that.

13 MR. BENNETT: Well, that was the commandeering  
14 point. We'll get to commandeering. There's no commandeering  
15 in the Bankruptcy Code.

16 THE COURT: Well, I don't mean to suggest that there  
17 is, but in the laws that Congress passed that the Supreme  
18 Court held unconstitutional there, they were legislating  
19 within their commerce clause or other enumerated power.

20 MR. BENNETT: Okay. In the radioactive waste case,  
21 the New York case, it was because they used means that were  
22 inappropriate that offended the solvency -- excuse me --  
23 offended the sovereignty of the states. In the Bankruptcy  
24 Code -- in the context of the Bekins case, I think when you  
25 read the case, they were worried about something different.

1 They were worried about the -- in Ashton the majority was  
2 clearly worried about the bankruptcy parts going too far and  
3 intruding on insolvent -- on sovereignty issues that weren't  
4 actually close enough to the core bankruptcy problem. That's  
5 where we got the governmental and political powers type  
6 exception that we have today, and so -- but I don't think  
7 there is -- your Honor is correct. If the way that the --  
8 that Congress chose to legislate on the subject of  
9 bankruptcies affecting municipalities was to tell state  
10 courts what state courts had to do, then you would  
11 conceivably have a problem, but there's nothing about the  
12 Bankruptcy Court that tells -- state any things what states  
13 have to do. What the Bankruptcy Code tells courts, what it  
14 tells federal courts what they should do when confronted with  
15 a municipality that petitions for relief and petitions for  
16 relief with proper authorization. And so I don't think that  
17 is -- that doesn't implicate the second half of the Tenth  
18 Amendment. It only implicates the first half of the Tenth  
19 Amendment, and, quite frankly, it's protected by it.

20 And this is going to come up with something later.  
21 When we think about the issue of priorities -- and that's a  
22 word that encompasses lots of different things, and we can  
23 break it down further if we need to -- priorities are at the  
24 core of the subject of bankruptcy, absolutely solidly in the  
25 core, so a point I want to make and we'll come back to is

1 that we're not really dealing with the part of the Bankruptcy  
2 Code that gets closest to offending sovereignty. We are  
3 really dealing with -- when we talk about where pension  
4 claims stand in the world and where they can be impaired, we  
5 are dealing something that is core to the subject of  
6 bankruptcies. It's not at the edge of the things that made  
7 the difference between the constitutionality and  
8 nonconstitutionality of the Bankruptcy Code under the Tenth  
9 Amendment.

10 THE COURT: Well, I think possibly your colleagues  
11 on the other side might take issue with that because they  
12 analogize the pension right to a property right, which is a  
13 matter of state law, at least under our present Bankruptcy  
14 Code. It probably doesn't need to be, as a matter of  
15 constitutional law, but it is.

16 MR. BENNETT: We will come later, and believe it or  
17 not, it's going to be implicated in other aspects of the  
18 Chapter 9 case not having anything to do with pensions to  
19 where the line is between a priority and a property right.  
20 When we talk later -- I'll get to it later. I have a whole  
21 section on why in this instance a pension is an unsecured  
22 claim and not a property right.

23 THE COURT: Okay.

24 MR. BENNETT: If we -- just to take a short part  
25 about it now, as I read the cases, there are some cases that

1 talk about an entitlement to money being a property right,  
2 but in every single one of those cases the money was there,  
3 so, for example, it was in a bank account and the balance was  
4 there. In another circumstance, you were dealing with a --  
5 an entity was reducing the amount of money that was supposed  
6 to be paid to an employee, but there was a hundred cent  
7 dollars there, and the three percent that was going to be  
8 carved out was going someplace else. There is no  
9 constitutional case that deals with a promise that there -- a  
10 promise that might or might not be satisfied because there's  
11 not enough money and say that kind of a promise is a property  
12 right. So I think that if you -- if we apply carefully the  
13 Supreme Court cases -- and when I get to them, I'll remember  
14 the citations -- we are going to find that an unsecured  
15 promise where the actual sum of money can't be pointed to  
16 because it's not there yet, that's not a property right and  
17 never has been, and so the Fifth Amendment is not implicated  
18 here. This is absolutely a contracts clause case, and we'll  
19 get to the contracts clause -- clauses in a second.

20 Okay. So I want to -- last point with respect to  
21 the Tenth Amendment, of course, Bekins says it's  
22 constitutional under the Tenth Amendment. The Bankruptcy  
23 Code, in particular, its part relating to municipalities,  
24 it's constitutional under the Tenth Amendment. It finds that  
25 the combination -- that apart from the fact that it's subject

1 to bankruptcies, it finds that the fact that the Code, then  
2 the Act, had carefully carved out governmental and political  
3 powers, kind of the -- that is, the relationship between a  
4 municipality and its subjects -- it's carved that out. It  
5 says that is an appropriate safeguard to states retaining  
6 sovereignty, and they say, "And, oh, by the way, there's a  
7 consent requirement." So those two things, the consent  
8 requirement, the -- what I'll call the 903-904 carveout, and  
9 the fact that the uniform laws on the subject of bankruptcies  
10 are fair game for the federal government, those three things  
11 are the three points that the Bekins court says it's okay for  
12 Tenth Amendment purposes.

13 Now, it's time to work about -- talk about the  
14 contracts clause problem. Your Honor is clearly familiar  
15 with what the contracts clause problem is. You have a  
16 contracts clause -- and I have a cheat sheet for everyone.  
17 I've provided my colleagues on my left with a copy during the  
18 break. If your Honor --

19 THE COURT: Sure.

20 MR. BENNETT: -- will, I'd like to pass up --

21 THE COURT: If you'd like me to look at it, sure.

22 MR. BENNETT: -- copies. And here we have the three  
23 clauses that we need to talk about, the federal contracts  
24 clause, the state contracts clause, and the pensions clause.  
25 As far as the Bekins court is concerned, it's talking only



1 about the federal contracts clause, and where I'm going is  
2 it's not going to make any difference. And what the  
3 Bekins -- the Bekins court doesn't think that consent of the  
4 state has anything to do with getting beyond this clause  
5 probably because it knows that there's no consent out to the  
6 contracts clause. Instead, it finds that the reason why that  
7 the municipal bankruptcy act is constitutional is because the  
8 entity that is actually impairing or changing contracts is  
9 not the state. It's not the municipality acting by the  
10 state. It is the court itself. And the key quote is the  
11 state invites the intervention of the federal, my word,  
12 bankruptcy power to save its agency -- that's really a  
13 synonym for municipality -- which the state itself is  
14 powerless to rescue. And the reason the state is powerless  
15 to rescue it is because of the contracts clause. Through its  
16 cooperation with the national government, the needed relief  
17 is given. So under -- so as far as Bekins is concerned,  
18 under Chapter 9 the federal government, through its courts,  
19 is the pertinent actor.

20 Now, you could write this more elegantly, and it  
21 wasn't in our briefs because I actually didn't find it until  
22 last night, and that is Ashton. You know, I have to  
23 confess --

24 THE COURT: That is what, sir?

25 MR. BENNETT: Pardon?

1 THE COURT: What did you say it was?

2 MR. BENNETT: Ashton. Until yesterday I'd never  
3 read Ashton. After all, everybody knew it had been overruled  
4 by Bekins. But I read it last night, and I got to the end,  
5 and I realized there was a dissent by Cardozo. And I read it  
6 because it was by Cardozo because he writes really well. And  
7 he took this particular issue head on, and so I'm going to  
8 read a lot of sentences from it. It's on page 142. And  
9 here's what he says. He, of course, is dissenting, so he's  
10 finding the last version constitutional, and he gets to the  
11 contract clause problem. And by the way, one of the things  
12 about Cardozo's dissent is that he's also much better about  
13 dividing the Tenth Amendment analysis from the contracts  
14 clause analysis. He kind of does it explicitly separately.  
15 And he says this. This is about the contracts clause. "The  
16 act does not authorize the states to impair through their own  
17 laws the obligation of existing contracts. Any interference  
18 by the states is remote and indirect." I'm going to skip  
19 some things, some citations and some things that aren't that  
20 important, and get to something that's more important. "If  
21 contracts are impaired, the tie is cut or loosened through  
22 the action of the court of bankruptcy approving a plan of  
23 composition under the authority of federal law. There, and  
24 not beyond in an ascending train of antecedents" -- it's an  
25 amazing sentence -- "is the cause of the impairment to which

1 the law will have regard," skipping some citations.  
2 "Impairment by the central government through laws concerning  
3 bankruptcies is not forbidden by the Constitution.  
4 Impairment is not forbidden unless effected by the states  
5 themselves. No change in obligation results from the filing  
6 of a petition by one seeking a discharge, whether a public or  
7 a private corporation invokes the jurisdiction." We're going  
8 to use that sentence again when we talk about whether -- how  
9 much we have to decide today. "The court, not the  
10 petitioner, is the efficient cause of the release."

11 For some reason Cardozo didn't participate in  
12 Bekins. The Bekins court, I think, said the same thing. I  
13 just think they said it a lot less clearly and a lot less  
14 elegantly.

15 So I think this is very informative about the right  
16 way to think about who is doing what and will become  
17 important when we get to the authorization problem, which  
18 we're going to be at very soon, but I want to --

19 THE COURT: Where do you think in Bekins the  
20 majority of the court or the court itself said the same  
21 thing?

22 MR. BENNETT: The words I read at the -- I'm sorry.  
23 I got to find the back pages. The words I started with,  
24 the -- it's at page 54. The state invites the intervention  
25 of the federal bankruptcy power to save its agency -- means

1 municipality -- which the state itself is powerless to  
2 rescue -- that's the reference to the contracts clause.  
3 Through its cooperation with the national government, the  
4 needed relief is given. I think the -- I think they're doing  
5 exactly the same thing and just managed to do it in a lot  
6 fewer words but with -- losing a teeny bit of precision in  
7 the process, but it is the same thing. They are basically  
8 adopting the Cardozo view of why the bankruptcy law is  
9 constitutional under the contracts clause, the federal  
10 contracts clause.

11 And, you know, I quoted these words, but there are  
12 words before it and words after it that basically zeroes in  
13 on that they're dealing with this particular issue at this  
14 particular point in time. This is just as much as they say.

15 The Bekins court, of course, there's no dissenting  
16 opinions. There's two judges that say they dissent for the  
17 reasons expressed by the majority in Ashton. That's all they  
18 do. And so that may well be one of the reasons why the court  
19 was a little bit less careful. Of course, what Cardozo said  
20 isn't precedent. It's just very, very clear thinking,  
21 elegantly written about exactly the problem we have in this  
22 courtroom today, and I think it's awfully persuasive, and I  
23 think it is reflective, although certainly done better, than  
24 the work that was done by the Bekins court.

25 A couple of other constitutional issues before we

1 move on to the authority points and the different contracts  
2 clauses. AFSCME does take the position in their papers that  
3 the contracts clause continues to constrain all municipal  
4 bankruptcies. Of course, the federal contracts clause we  
5 know from the Supreme Court does not. We'll talk about  
6 whether there's any difference in the state courts soon. But  
7 why AFSCME takes that position is they know full well that if  
8 the contracts clause is easily bypassed by a municipal  
9 bankruptcy case -- and we think that it is for precisely the  
10 reasoning of Judge -- Justice Cardozo -- then this is over  
11 because the contracts clauses, as we're about to get to, are  
12 very, very similar. They're almost identical to each other,  
13 and they're identical in all the ways that matter. We will  
14 go through it very carefully.

15           There was next the point that was made about  
16 accountability. I don't think there's any confusion about  
17 accountability. I think, again, I appeal to Cardozo's  
18 language but also to Bekins on this point. If you don't like  
19 the powers that a court has in Chapter 9, write your  
20 Congressman. If you don't like the way Detroit was managed  
21 so that it wound up in Chapter 9, don't let the people who  
22 used to be in office be in office again in Detroit. If you  
23 don't like the emergency manager and don't think he was  
24 qualified and don't like what he was doing, write the  
25 governor or your state legislator. There is no

1 accountability question if you break it down in the way that  
2 Cardozo broke it down. And by the way, the other thing  
3 Cardozo says and I think also Bekins says, there's nothing  
4 wrong with asking. You have to ask if you're going to do  
5 this consensually. The emergency manager on behalf of the  
6 city had to ask the retirement funds directly, retirees more  
7 indirectly, to reduce or change benefits in order to  
8 accommodate the needs of current city residents and the  
9 ability of the city to survive. They could also ask the  
10 Court to exercise its authority to help, too. That doesn't  
11 mean they are the one loosening the knot or cutting the knot.

12 We talked about Asbury Park. Anti-commandeering  
13 cases. Again, I think -- well, the federal government's  
14 brief does a much nicer job on this than I ever could in  
15 pointing out that the essence of the commandeering cases are  
16 the federal direction to state actors -- in this case, maybe  
17 it would be state judges or the emergency manager or the  
18 governor -- to do something in a particular way. And, in  
19 fact, the -- that's not what happens. That is not the  
20 structure of Chapter 9 at all. The structure of Chapter 9 is  
21 that there is certain power that is vested in this Court, and  
22 that power can be used in certain ways. Frankly, your Honor  
23 can't tell the city what kind of plan to file, but your Honor  
24 can say whether or not you will approve a plan that is filed,  
25 so the request has to be made by the city, and the power has

1 to be exercised by your Honor. Again, the city itself is  
2 powerless to escape the contracts clause, but it does not --  
3 at no point does the federal government say I have a policy  
4 that I am going to ask the states or demands that the states  
5 implement for me. That doesn't happen anywhere in Chapter 9,  
6 and, frankly --

7 THE COURT: Well, but Ms. Ceccotti doesn't agree  
8 with that. What she says is Congress says if you want to  
9 adjust your debts, we prescribe the priority scheme to the  
10 exclusion of the state. The state can't come in with its own  
11 notion of what the priorities should be so that the division  
12 of sovereignty that results violates the Tenth Amendment.

13 MR. BENNETT: Well, first, there's a logical failure  
14 there, and it has to do with Asbury Park. The UAW starts  
15 with the proposition that there is some kind of viable state  
16 restructuring process that can actually work and that the  
17 federal government took it away from them and made the  
18 bankruptcy -- the Chapter 9 exclusive. That isn't reality.  
19 Asbury Park, as we've seen, first of all, is an unbelievably  
20 exceptional case, which, by the way, the end holding is that  
21 that restructuring was done for bonds and made bonds better.  
22 That is the holding at the end of the day or the key facts at  
23 the end of the day in Asbury Park. Asbury Park is not and  
24 never has been construed to be -- and no one cited any case  
25 to your Honor showing that in the period of time before

1 Congress claimed the field for itself that there was any  
2 viable municipal debt adjustment opportunity created by what  
3 we have to call the Asbury Park exception to the contracts  
4 clause. And if you believe everything in the UAW's belief --  
5 brief and believe their interpretation of the pensions  
6 clause, it gets even worse, that even if there were -- was  
7 Asbury Park wiggle room and then in the absence of the  
8 Bankruptcy Code the pensions clause is absolute, you have  
9 worse than nothing. You have worse than the almost  
10 meaningless Asbury Park exception. So I don't think it's  
11 coercion for the -- for Congress to say you can't do  
12 something that you can't do. And I think the prohibition on  
13 competing state municipal schemes is, frankly, recognition  
14 that they're not possible or workable, and, again, no one has  
15 been able to show you either before or after that provision  
16 of the Bankruptcy Code what this wonderful municipal scheme  
17 is out there that would have been a choice. Cardozo doesn't  
18 think there's any choice. Bekins doesn't think there's any  
19 choice. And that's the same court that decided Ashton, so  
20 I -- about the same time actually or Blaisdell was about the  
21 same time. Ashton may have been later. This is a -- I  
22 think -- I don't think Congress coerced anybody. I don't  
23 think that's possible on the facts.

24 Okay. So to summarize, we've shown that Chapter 9  
25 is constitutional and that, in particular, it does not offend



1 the contracts clause in the United States Constitution. I  
2 think along the way we've demonstrated that the state's  
3 authorization of a municipality's resort to Chapter 9 for  
4 relief from contracts generally does not constitute a state  
5 impairment of contract because otherwise no -- not a single  
6 Chapter 9 would work. We have also along the way noted that  
7 the filing of a petition itself doesn't constitute impairment  
8 of anything in any event and that if there is an impairment,  
9 it's by the federal Bankruptcy Court, so now let's look at  
10 our contracts clause cheat sheet and try to find out whether  
11 there's any difference because of the fact that there's a  
12 state contracts clause or because there's a pensions clause.

13 First, with respect to the state contracts clause, I  
14 don't think anyone has suggested to the Court that this is  
15 any different than the federal contracts clause, and, in  
16 fact, there isn't. There's no difference, and no one  
17 suggested it, so -- but, by the way, Justice Cardozo, again,  
18 as -- more elegantly and more precisely but -- and the Bekins  
19 court both would believe that the state contracts clause --  
20 okay -- is also focused on the state. It doesn't bind the  
21 federal government. And since the federal government is the  
22 relevant actor, the state contracts clause does not impose  
23 any obstacle at all to a municipality invoking Chapter 9  
24 relief.

25 The only thing I want to pause to say is it couldn't

1 be otherwise because if it were otherwise -- I skipped a  
2 step. Every state -- at least every state I looked at, so  
3 there may be an exception, but every state has a state  
4 contracts clause. It's not surprising. Copied it from the  
5 federal Constitution. So if it were the case that the  
6 state's contracts clause was different than the federal  
7 contracts clause and that it was a barrier to invoking  
8 Chapter 9 relief, then every single bondholder in every  
9 single -- I should say every single lawyer for every single  
10 bondholder in every prior Chapter 9 case has probably been  
11 guilty of malpractice because they might have been able to  
12 escape their prior Chapter 9 cases -- and there are now  
13 hundreds on the books -- on this basis alone. But, again,  
14 for the reasons expressed in Bekins and more elegantly by  
15 Judge -- Justice Cardozo, they can't.

16 So now we finally get -- we reach the pensions  
17 clause also quoted in front of you, and we say, okay, is this  
18 pensions clause any different than --

19 THE COURT: But hang on. Isn't there a difference  
20 between reconciling the bankruptcy clause with the federal  
21 contracts clause on the one hand and trying to reconcile how  
22 a state that prohibits itself from impairing contracts with  
23 taking advantage of the bankruptcy power that the federal  
24 court has enabled -- or that the federal Congress has enabled  
25 because of the sovereignty of the state?

1 MR. BENNETT: No difference. Why? Let's remember.  
2 The reason why I spent so much time talking about why was the  
3 Debt Adjustment Act under the Bankruptcy Act constitutional  
4 as far as the federal contracts clause was concerned -- it  
5 wasn't about the language of the federal contracts clause.  
6 It was because the state isn't an actor. The federal  
7 contracts clause acts only on states. The relevant actor is  
8 the federal government. It's the Bankruptcy Court. That was  
9 the reason why there was no federal contracts clause problem  
10 with the Bankruptcy Act in Bekins, and it was the only  
11 reason -- the only part of the opinion that had to do with  
12 the federal contracts clause part of the problem. The state  
13 contracts clause acts again only on the state, not on the  
14 federal government. Accordingly, if you believe -- and the  
15 Supreme Court has held that the relevant actor for purposes  
16 of untying or cutting the knot is the federal Bankruptcy  
17 Court and not the state, then the state contracts clause  
18 forms no additional barrier to the use of the Bankruptcy Code  
19 than the federal contracts clause did. They are the same,  
20 and they are both not relevant for the same reason.

21 THE COURT: And your position is that it's a matter  
22 of federal law that the pertinent actor is the federal court,  
23 not the state entity that's in bankruptcy?

24 MR. BENNETT: The Supreme Court told us along the  
25 way to approving the Bankruptcy Act the first -- for

1 municipalities the first time that it's --

2 THE COURT: So even if the state law were to say  
3 it's the city that's the pertinent actor, that's not relevant  
4 because it's a federal law question.

5 MR. BENNETT: Correct. So for purposes of federal  
6 law, the Supreme Court has told us it's the federal  
7 Bankruptcy Court that is the relevant actor.

8 So now we get to the pensions clause, and we've got  
9 to find that there's a difference. And I think I want to  
10 start here. This is going to be somewhat repetitive of the  
11 brief. There's nothing in the pensions clause that says  
12 anything like, quote, "and the state shall not authorize any  
13 municipality to commence a bankruptcy case that would allow a  
14 federal court to impair or diminish pension claims." It just  
15 doesn't say that. And, of course, it is words like that that  
16 the objectors are saying have to be imported into the  
17 pensions clause.

18 It's hard, I think, because at the end of the day,  
19 apart from the fact that the pensions clause is, quote, "more  
20 specific," and it's, of course, more specific because they  
21 were looking at pensions because the law in Michigan at the  
22 time they were looking at the pensions clause was that  
23 pensions weren't a contract. That's the only reason it's  
24 more specific. It wasn't because -- there's no other  
25 evidence for why it was more specific. The only

1 difference -- the only words that are different are the  
2 words, quote, "be diminished." Excuse me. Quote,  
3 "diminished or." That's the only difference. "Impaired" is  
4 used in all of them. "Prohibition of impairment" is used in  
5 all of them. All of them are absolute about prohibitions of  
6 impairment.

7 And I'm going to take this in two steps. First of  
8 all, the objectors say --

9 THE COURT: Well, but hang on. There's the next  
10 sentence, which you didn't include on here, the next sentence  
11 of the pension clause.

12 MR. BENNETT: Okay. The funding sentence?

13 THE COURT: Yes.

14 MR. BENNETT: Okay. Well, frankly, that's not  
15 focusing on today, and it sounds like it's a --

16 THE COURT: Well, but the objectors argue that this  
17 additional consideration that the Michigan Constitution gave  
18 to pensions which it didn't give to contracts elevates it,  
19 makes it, if not absolute, more absolute than contracts.

20 MR. BENNETT: Well, let's talk about -- I  
21 specifically wanted to talk about that because --

22 THE COURT: Okay.

23 MR. BENNETT: -- first of all, why is it -- we  
24 should ask ourselves question number one. Why is it that the  
25 federal contracts clause and the state contracts clause

1 became less than absolutely binding? It wasn't because of  
2 the inadequacies of the language. It was -- in fact, what  
3 the courts have done is they put the word "substantial" in  
4 front of the word "contract," so an insubstantial impairment  
5 doesn't count, and a substantial impairment has some extra  
6 hurdles that you have to go over before you can make it. So,  
7 frankly, if what they were trying to do was to tighten the  
8 pensions clause and make it more distinctive -- and if they  
9 went to the books because, of course, all of the cases, you  
10 know, Worthen versus Thomas, Home Building & Loan Association  
11 versus Blaisdell, these are like cases from the mid-'30s, so  
12 they were all on the books in 1961 through 1963, so they knew  
13 that, and they knew that the problem was the incorporation of  
14 the substantialness concept. So if they were really after  
15 solving that problem, why didn't they just put the words  
16 right before "impairment" "substantial or insubstantial  
17 impairment"? And they could have tightened it up in the way  
18 that it had been loosened. They could have prohibited  
19 substantial and insubstantial impairments. That would have  
20 dealt with -- if they were trying to say we're opting the  
21 pensions out of the judge-made doctrines and exceptions that  
22 have burdened the federal contracts clause and the state  
23 contracts clause, that's how they might do it.

24 Now, by the way, it would be irrelevant to this  
25 argument because remember the pensions clause, just like the

1 state contracts clause, just like the federal contracts  
2 clause, acts on states and municipalities. It doesn't act on  
3 the Bankruptcy Court. It doesn't act on the federal  
4 government. And once again, if the right actor -- if the  
5 actor that unties the knot or cuts the knot is the federal  
6 Bankruptcy Court and the federal government and not the state  
7 and not the municipalities, as the Supreme Court says, then  
8 the pensions clause, even with the words "substantial or  
9 insubstantial" in front of it, doesn't get you all the way  
10 home. What they next needed to do in the pensions clause is  
11 to say by enacting the pensions clause and giving it -- and  
12 making pensions special, we now want to do something else.  
13 We really want to say -- objectors thinks the Constitution --  
14 that the convention -- that the conventioners really wanted  
15 to say, well, in a municipality that has material pension  
16 claims, they can't resort to a federal court to seek relief.  
17 That's what they really want us to find in the pensions  
18 clause. But, frankly --

19 THE COURT: No, no. I don't hear that at all. What  
20 I hear is you are welcome to come in that door so long as the  
21 city's assets, according to Mr. Dusen, are first allocated to  
22 pensions.

23 MR. BENNETT: Well, if there was a lawyer around  
24 there at the constitutional convention who was doing  
25 research -- and I suspect that there was -- they should be

1 charged with figuring out that the only way to stop the  
2 federal courts -- if there is even a way, but the only way to  
3 stop federal courts from having the power to impair contracts  
4 that maybe a state can't impair is to cut off the -- is to  
5 basically say the state cannot ever go to a federal court for  
6 a federal -- then it was called composition, you know,  
7 federal debt composition case.

8           And the other point that your Honor should note is  
9 that -- and we say this in our papers -- during the entire  
10 constitutional convention, for years before and almost  
11 continuously thereafter, the State of Michigan had authorized  
12 the municipalities to file Chapter 9 cases, so if they were  
13 really elevating pensions in the way of taking them --  
14 distancing themselves from the federal power to impair them  
15 and they knew, open paren, one, that the federal debt  
16 composition scheme had been determined to be constitutional  
17 by the Supreme Court in part because the federal court was  
18 doing the work of impairing contracts and they knew -- they  
19 have to be presumed to know that Michigan had opted in and  
20 had continuously all through the period -- in fact, I think  
21 in our papers we say when they repealed it. I think they  
22 repealed it around 1980 when general authorization was all  
23 that was necessary, so they kind of covered the entire  
24 period. No one ever said, gee, we better as hell change  
25 this. And in all of the legislative history of the



1 constitutional convention, you don't have a word about  
2 bankruptcy and pensions, and the words that you do have --  
3 the words that were quoted to you in the papers just filed --  
4 I have to find it. Okay. Here's AFSCME's best quote from  
5 the official record of the constitutional convention, 2  
6 Official Record, page 3402. This is a new section that  
7 requires that accrued financial benefits of each pension plan  
8 and retirement system of the state and its political  
9 subdivisions be a contractual obligation which cannot be  
10 diminished or impaired by the action of its officials or  
11 governing body. It's in AFSCME's papers, paragraph -- the  
12 new ones, the supplemental papers. Actually, those are  
13 amended and restated, paragraph 19, page 11. Same brief,  
14 paragraph 142, page 71. Pension benefits constitute, quote,  
15 "deferred compensation for work performed which should not be  
16 diminished by the employing unit after the service has been  
17 performed," close quote. Those are the quotes that you were  
18 offered by AFSCME about the seriousness and importance of the  
19 work done in the constitutional convention from 1961 to 1963,  
20 this against the background where it's been the law of the  
21 land, at least as far as the Supreme Court is concerned,  
22 since 1930 -- I can't remember exactly.

23 THE COURT: So is it your view that the only  
24 effective way that the Michigan Constitution could have  
25 provided the protection for pensions that the objectors seek

1 here is by the Constitution prohibiting a Chapter 9 filing?

2 MR. BENNETT: Prohibiting authorization of a Chapter  
3 9 filing or -- yes, your Honor. That's exactly what they  
4 would have had to do, and that's not the kind of thing that  
5 they can do by implication.

6 I want to talk a little bit more because I think  
7 there's a lot of stress that's put on the words "diminished  
8 or," and there is the assertion that "diminished or" has to  
9 be given some meaning, but, frankly, the only meaning it  
10 could be given is to somehow expand "impaired." I don't  
11 personally think it does expand "impaired," and there's -- I  
12 want to point out before moving on with a whole bunch of  
13 authority to that effect that it's really dangerous for a  
14 court to decide that "diminished or" added anything to  
15 "impaired" because if the Court decides that "diminished or"  
16 filled some gap that's related to the word "diminished and  
17 impaired," then in the next case someone is going to come to  
18 your Honor and say, "You know that state contracts clause?  
19 There's no 'diminished' there, and 'impaired' has to mean  
20 less than 'diminished or impaired' in the pensions clause."  
21 So it's actually a good thing that there's law out there on  
22 this subject -- we had it in our brief -- that basically says  
23 that if you run into one of these problems where you've got a  
24 list and you want to say that they all have an independent  
25 and separate meaning, you've got to propose an independent

1 and separate meaning for the terms on the list that actually  
2 solve the problem. And in this case, trying to find an extra  
3 meaning for "diminished or" -- again, it's consistent with  
4 its place in the sentence -- does -- creates a mess in the  
5 state contracts clause in Article I, Section 10.

6           Apart from that, it turns out that when you go look  
7 at the books -- and this is not in our papers because this  
8 was an issue raised in the responsive papers -- is that every  
9 time we found the definition of "impair" in the cases or in  
10 dictionaries, it includes diminishment, which should not be  
11 terribly surprising. It's a very common sense answer. But  
12 if you want a list -- and you might need them in connection  
13 with putting together an opinion -- you could start with the  
14 Bank of Minden case, which is a Supreme Court case, 256 U.S.  
15 126 at 128. Then if you want to go to the Sixth Circuit,  
16 Riverview Health Institute, 601 Fed. 3d 505. Black's Law  
17 Dictionary, Webster's Third, and then there's a bunch of  
18 state courses -- state cases from other states that all say  
19 the same thing. I could read the quotes, but I'll save the  
20 time because it really is kind of a commonsensical -- a  
21 common -- it's common sense that "impaired" has to include  
22 "diminished." "Impaired" is much broader than "diminished,"  
23 and every so often this is either a -- there's a rhetorical  
24 flourish that works its way in, and this may well be what  
25 that is, and that's all it can be.

1           Okay. Moving on to the issue of whether or not the  
2 authorization to file Chapter 9 is ineffective because the  
3 emergency manager or the governor recognized that impairment  
4 of pension benefits may be necessary. I don't want to add  
5 additional arguments to the constitutional provisions.  
6 That's not the purpose of this section. The purpose of this  
7 section is to deal with the point made, I think, by only one  
8 or two of the objectors that the -- that there's an  
9 instruction to the emergency manager to comply with the  
10 pension statute, and that should apply to the filing of a  
11 Chapter 9 case as well. I'm sure your Honor has your own  
12 copy of the Local Financial Stability and Choice Act, Act  
13 436, and when you look at the -- most importantly, when you  
14 look at the Chapter 9 authorization section, there is no  
15 instruction that the emergency manager comply with the  
16 protections affecting pensions. By the way, that may well  
17 make sense. There are a whole bunch of other provisions that  
18 talk about what the emergency manager is supposed to do out  
19 of court, and not surprisingly it talks about him having to  
20 comply with many laws and to pay many debts and to do many  
21 things. He resorts to Chapter 9 when he can't accomplish  
22 those things out of court. And if one thought that anything  
23 about the emergency manager law meant to say that the  
24 emergency manager had to in Chapter 9 continue to not impair  
25 pensions, you would think it would belong in the section that

1 is applicable when the emergency manager files Chapter 9.

2 In addition, I think the part that was read to your  
3 Honor earlier this morning has a lead-in clause that didn't  
4 make it into the record. It reads, "If the emergency manager  
5 serves as sole trustee of the local pension board, all of the  
6 following should apply," and that's where the provision that  
7 was located was read to you, so there is nothing in the  
8 emergency manager law -- and, in fact, the structure of the  
9 emergency manager law itself suggests that a lot of bets are  
10 off in a Chapter 9 context that may not be -- including  
11 things that the emergency manager is supposed to try to  
12 accomplish if he's in an out-of-court world.

13 Next argument, failing to condition authorization on  
14 nonimpairment of --

15 THE COURT: One second. Does that suggest that in  
16 order to accomplish what Mr. Orr thinks is necessary to  
17 accomplish with regard to pensions, he needs to be a trustee  
18 of the plan?

19 MR. BENNETT: No. It's that -- no. He has the  
20 right to remove trustees of the plan for other purposes, and  
21 these are these extra requirements that are imposed upon him  
22 just in those circumstances that it -- I think when your  
23 Honor gets a chance to look at it -- what did I do with it?  
24 I had it here a second ago, so I'll give you -- let me give  
25 the exact section referenced so it's easy to find.

1 THE COURT: Okay.

2 MR. BENNETT: The part I read from is in Section  
3 12(m), and it is confined to that relatively narrow  
4 circumstance.

5 Okay. First of all, on the issue of whether or not  
6 the governor's failure to put conditions on authorization  
7 makes the authorization invalid, we indicate in our brief  
8 that we don't think that conditions on authorization could be  
9 valid, that -- and as I think -- I think I got ahead of  
10 myself earlier, so I don't want to take too much time in  
11 covering it again now, but we're talking here about one of  
12 the core subjects of bankruptcy, which is priorities, who  
13 gets paid when there's not enough to go around. If that's  
14 not a core subject of bankruptcy -- not in the core versus  
15 related, but if that's not the absolute center of the subject  
16 of bankruptcies, I don't know what it is. And we've cited a  
17 lot of law, and your Honor has pointed out there are many  
18 cases, none decided the other way, that say particularly in  
19 the context of things touching on priorities and who gets  
20 paid first and who gets paid second, who doesn't get paid at  
21 all, that the -- that you buy the Bankruptcy Code as a whole.  
22 You buy the scheme as a whole. You don't buy parts of it.  
23 And in this sense federal law is supreme because once there  
24 is a proper bankruptcy case before the Court, it is the  
25 federal priority scheme that applies. It is legitimate that

1 the federal priority scheme applies because it's legislation  
2 on the subject of bankruptcies, and because it's legislation  
3 on the subject of bankruptcies, it is absolutely supreme,  
4 period, end of story.

5           So, as to your Honor's hypothetical, if anyone walks  
6 into the federal court and says, "I want federal judicial  
7 relief. I want to use that federal power to untie and cut  
8 knots, but I want the ultimate distribution or really any  
9 part of the distribution to be conducted in accordance with  
10 my terms," whether they're found in a statute or in a state  
11 Constitution, it doesn't matter. The federal law on this  
12 issue is supreme, and it's supreme over Constitutions and  
13 over statutes, period, end of story.

14           It seems kind of small when done with that to point  
15 out that 436 permits but doesn't require conditioning. We  
16 can imagine a whole bunch of conditions that might have been  
17 very sensible and that might not offend federal jurisdiction  
18 like it could have been -- there could have been suggestions  
19 or requirements as to exactly how the emergency manager  
20 should interact with other elected representatives or with  
21 other people. Actually, the governor does have one -- it's  
22 not quite a condition. It's a suggestion, but I think he'd  
23 be offended if it wasn't followed, which is he wants Mr. Orr  
24 to continue to communicate with the governor and the  
25 treasurer relating to what he's doing. So I think we can

1 think of several things that could be -- that you could use  
2 for the PA 436 conditioning power that would be perfectly  
3 okay, but going in and saying, "Gee, as a matter of this  
4 particular state law" -- and, by the way, it's -- the  
5 governor would -- to do that, he's got to ignore the  
6 conflicts that I discussed earlier between a law that says  
7 thou shall not impair this one with another law that says  
8 you're the first money out. It's mind-boggling what he'd  
9 have to reconcile, but the instruction would be, yeah, this  
10 one we really meant and the others we didn't really mean,  
11 follow that one first. I think that that would be an invalid  
12 authorization. I think the Court would have to say that  
13 authorization isn't okay for federal court purposes. I think  
14 as a prudential matter, the federal court should not get  
15 involved in a case where the authorization is conditioned in  
16 a way that would offend the federal scheme, but understanding  
17 that there may be very extreme and difficult circumstances  
18 involved, a creative federal court might want to give people  
19 some time to kind of take a couple steps back and figure out  
20 how to do it better.

21 THE COURT: Let me ask about Section 943.

22 MR. BENNETT: I need to get a case if you're going  
23 to do that because I -- from the --

24 THE COURT: This is the Bankruptcy Code.

25 MR. BENNETT: Yeah.



1 THE COURT: 943(b)(4).

2 MR. BENNETT: Right. There's actually one case  
3 that's dealt with that previously, and I think it's --

4 THE COURT: Let me just get my question out.

5 MR. BENNETT: Okay.

6 THE COURT: Thank you. So the question is what does  
7 this section mean if it doesn't mean that the state can  
8 dictate the priorities?

9 MR. BENNETT: Because it says "from taking any  
10 action necessary to carry out the plan," and I --

11 THE COURT: What does that -- what does that  
12 language mean? What meaning does it have? How does it come  
13 into effect?

14 MR. BENNETT: Okay. I think the best way to work  
15 through that is the Sanitary Improvement District Number 7  
16 case, 98 B.R. 970, and this is a really fascinating case  
17 because the facts gave you every conceivable issue under the  
18 sun in terms of the interpretation of this section. What  
19 happened in Sanitary Improvement District is that the debtor  
20 had -- you know, had claims against it. Let's call them a  
21 hundred. I'm using representative numbers, not the actual  
22 numbers. As a result of the bankruptcy case, they issued  
23 paper, and I think it was like 60. Okay. And the -- but the  
24 paper that was 60 had in it a provision that said that if the  
25 debtor paid it in full within a certain number -- within a

1 certain number of months -- I think it was 18 months -- after  
2 the bankruptcy case is over, it only had to pay 95 cents on  
3 the dollar or something like that, and so the creditors came  
4 in, and they attacked the whole plan, pointed to a state law  
5 that says thou shall pay your bonds. By the way, there are  
6 laws like that in Michigan, too. And the court decides very  
7 easily that the takedown from a hundred to 60, well, that's  
8 supremacy clause bankruptcy. You can do that notwithstanding  
9 state law. What you can't do, though, is because state law  
10 says you have to pay bonds at a hundred percent of principal,  
11 you can't have the five-percent discount feature because  
12 that's -- after the bankruptcy, you issued this new bond, you  
13 know, with 60 being the new hundred, but you've said that you  
14 can still pay that off at a discount. That violates  
15 943(b)(4). So what this case illustrates is that this looks  
16 at the obligations after they've been restructured and says  
17 that the Bankruptcy Court does the restructuring. By the  
18 way, very consistent with the Cardozo and the Bekins view of  
19 the world, you -- and you're finished. The bankruptcy --  
20 there's a confirmation order. New instruments are issued.  
21 Those instruments, the ones that you walk out of Bankruptcy  
22 Court with, have to be instruments that you can perform in  
23 accordance with state law.

24 THE COURT: So this provision, in your view, says  
25 nothing about the requirement of the plan itself or the order

1 confirming plan to comply with state law.

2 MR. BENNETT: I don't know if there's any case that  
3 says that. There may be. I think Sanitary and Improvement  
4 District Number 7 has got it right, that it does not say  
5 anything about the Bankruptcy Code restructuring process. It  
6 only acts on the debt that is issued after the case is over.

7 I don't think I have to spend time on it, so I'm  
8 going to skip over -- again, it's in our papers. There's an  
9 assertion in the papers that the Tenth Amendment is not  
10 reserved -- that the Tenth Amendment reserves every issue  
11 relating to municipal pensions to the states. I think we've  
12 dealt with that enough in the constitutional section, and I  
13 don't have to deal with -- this really is the -- an argument  
14 was built, constructed based upon the fact that in the case  
15 of ERISA the federal government didn't make ERISA -- didn't  
16 make states or municipalities applicable to ERISA, didn't  
17 create the insurance program, PBGC, and the assertion is made  
18 because the federal government chose not to go into those  
19 areas, they must have done that because they were absolutely  
20 precluded from doing so, ergo they are precluded from using  
21 the bankruptcy power to modify pensions. I think that fails  
22 logically in a lot of places, but most importantly maybe to  
23 start with is that it's not clear that there is no possible  
24 way for the federal government to apply the ERISA statute or  
25 the PBG statute to state municipalities, maybe to states but

1 not to municipalities, and -- at all, by the way, and that  
2 Congress didn't may have reflected political realities at the  
3 time and not actual constitutional limitations, so I think  
4 the starting point of that argument just fails, and I think  
5 we've seen that federal -- that a federal bankruptcy power  
6 can be applied by the federal court to obligations. Pensions  
7 are clearly within the federal bankruptcy power, no dispute  
8 in the private context. There's nothing different about  
9 Chapter 9 context. And so there is no such part of the Tenth  
10 Amendment that constrains this aspect of the subject of  
11 bankruptcies.

12           The next point is a really important one, and I  
13 could easily have started with it, and I know your Honor has  
14 been concerned with it throughout, which is whether or not  
15 your Honor really has to deal with the -- whether or not  
16 pensions can be impaired in bankruptcy in the context of  
17 authorization. I hope it's clear to your Honor that the city  
18 is perfectly comfortable with you dealing with it now or  
19 perfectly comfortable with dealing with it later. We don't  
20 think that this is -- some of these things may be a little  
21 bit conceptually difficult and complex, but the  
22 constitutional law on the subject is really pretty clear, and  
23 so we're prepared to have it decided. We think that there's  
24 only one way to decide it. There is, though, a way for your  
25 Honor to decide not to decide it, which is to find -- and the

1 next to the last sentence I read from Justice Cardozo in his  
2 dissent where he says, "just the filing is not doing  
3 anything," we say that, too. It is starting a bankruptcy  
4 case. I have said at the beginning -- I mean it -- there is  
5 nothing inevitable. A cramdown of revisions to pension  
6 benefits, a cramdown of a particular treatment of the  
7 underfunded portion of the pension obligation is not  
8 necessarily the way this case is going to end, and it's not  
9 necessarily the next step in this case. We just don't know.  
10 The next -- obviously right now mediation is an important  
11 milestone. The next important milestone is the plan, and  
12 since your Honor has been around the Bankruptcy Courts for a  
13 good long time, you know that the plan that we file before  
14 the end of this year is not likely to be the plan that we  
15 ultimately confirm. It would be actually a good exercise for  
16 different people to figure which amended plan is going to be  
17 the plan. The bottom line is nobody really knows. And so it  
18 is possible to adopt Justice Cardozo's view that no change in  
19 obligation results from the filing of a petition by one  
20 seeking a discharge whether a public or private corporation  
21 invokes the jurisdiction and basically say since nobody has  
22 done anything yet, we're not going to decide anything more.  
23 You could do that. I will say that the -- I think that the  
24 assertion that there is an imminence that -- an imminence of  
25 harm represented by the filing of the Chapter 9 case that

1 requires this Court to act is, frankly, not a fair statement  
2 of the law. I think one of the more important cases is  
3 Donohue. It's been cited by objectors. The most important  
4 part -- Donohue is the Nassau County financial restructuring  
5 case, and the most important part of Donohue that led the  
6 Court to act I think is mentioned by the Court. It's kind of  
7 near the end of the opinion. The Court says the law, the  
8 ordinance that gave the county executive all the powers,  
9 "provides expansive and seemingly limitless power to the  
10 County Executive without any reasonable restraints other than  
11 the procedural mechanism of an executive order." This case  
12 would be a lot simpler if all Kevyn Orr had to do to  
13 reorganize the debts of Detroit was to say how he wanted to  
14 do it and sign it as an order. He doesn't think he has that  
15 power. I don't think he has that power. No one in this room  
16 thinks he has this power. We've talked about the fact that  
17 to get to a debt adjustment plan that is nonconsensually  
18 confirmed, it has to be filed. There has to be disclosure  
19 statement approved. There has to be voting. There has to be  
20 more discovery. There has to be a confirmation hearing, and  
21 there has to be an order of this Court. That is a very  
22 different procedure or array of protections than was  
23 available in the Donohue case, which is, frankly, the closest  
24 case to this one in terms of the kinds of things that we're  
25 talking about here. If your Honor goes through the other

1 cases that have been cited for the proposition of imminent  
2 harm, you will find that in all of them there was no judicial  
3 step going to occur before the harm might be inflicted. In  
4 all of --

5 THE COURT: Let me ask that question here. Can  
6 you -- are you willing to identify here on the record or can  
7 you identify here on the record any conceivable circumstance  
8 in which retiree benefits, pensions won't be impaired by a  
9 plan?

10 MR. BENNETT: You know, your Honor, at this point  
11 there are a number of major things that I don't know, and I  
12 will say I don't know that there won't be money from outside,  
13 although I tend to doubt it. I don't know that. I do not  
14 know whether there will be -- whether certain other assets  
15 will, in fact, be available to the city to address its debts,  
16 and I will point out in this regard that while the objectors  
17 have cited over and over and over again a pleading filed by  
18 the attorney general asserting the primacy of pension claims,  
19 they've all managed to have forgotten a formal opinion he's  
20 given concerning the accessibility of certain assets in this  
21 bankruptcy case, particularly the art, and -- but I have no  
22 idea, number one, what's going to happen with that, and I  
23 have no idea what the -- whether or not there will, in fact,  
24 be a transaction involving the departments of water and  
25 sewerage and whether those transactions will deliver material

1 dollars. So while I'd be kidding myself and kidding the  
2 Court and kidding everyone here if I said that I thought it  
3 was anything but likely that there would be some impairment  
4 of the underfunding claims in this case, it's not fair to ask  
5 me and I don't think I could say that there's no scenario  
6 where impairment will not be necessary. I just don't think I  
7 can even say that today.

8 THE COURT: Okay. Even with that much of a  
9 disclosure here, why isn't that enough to say there's an  
10 impairment here?

11 MR. BENNETT: I'm sorry.

12 THE COURT: Why isn't that enough to say at this  
13 point in time there's an impairment?

14 MR. BENNETT: Well --

15 THE COURT: There's a sufficient impairment to get  
16 past ripeness anyway.

17 MR. BENNETT: You know, I don't think you can say  
18 there's impairment because the Supreme Court has told us  
19 there is not. There won't be impairment, your Honor, until  
20 you say so. Is there a risk of impairment? There's a risk  
21 of impairment. Is the risk of impairment enough to make this  
22 ripe? And the answer is is that -- I think this is the  
23 answer when -- I mean the Donohue case is a good example, but  
24 I think it ripples through all the others, which is that if a  
25 court is presented with a situation where there's a risk of



1 impairment and the impairment can occur before there's  
2 another opportunity or requirement that people show up in  
3 front of a judge, then they start thinking about whether  
4 there's interim harm, but there's not a single case that has  
5 been cited to you that says there is imminent harm in  
6 circumstances where no one is going to suffer anything until  
7 and unless a court enters an order after notice,  
8 opportunities for discovery, opportunities for hearing, and  
9 all the other protections that are available in connection  
10 with a plan confirmation process in a Bankruptcy Court. It's  
11 just totally different. The cases are dealing with a totally  
12 different situation, particularly the Donohue case.

13 Do you have -- we're 20 minutes to.

14 THE COURT: Twenty till five.

15 MR. BENNETT: Do you want to save time for your  
16 questions or --

17 THE COURT: If you want to stop now, and we'll pick  
18 it up with the government's attorney, that's fine with me,  
19 and then we'll pick up the balance of your argument tomorrow.  
20 Is that what you're --

21 MR. BENNETT: I think it's a good break point.

22 THE COURT: Okay.

23 MR. BENNETT: I have very minor things left.

24 THE COURT: Good.

25 MR. TROY: Matthew Troy, your Honor, Department of

1 Justice, Civil Division, on behalf of the United States. If  
2 it makes any difference to your Honor or the other parties, I  
3 am here for tonight and can be available tomorrow as well.

4 THE COURT: I appreciate that, but since you're  
5 here, let's have at it.

6 MR. TROY: Fair enough.

7 THE COURT: Well, my primary questions relate to how  
8 you address the arguments here that the objecting parties  
9 made in response to your brief regarding ripeness.

10 MR. TROY: To be honest with you, your Honor, I've  
11 only reviewed those very quickly because I filed the brief on  
12 Friday and then went back to furlough status. And on  
13 Monday --

14 THE COURT: That.

15 MR. TROY: And on Monday --

16 THE COURT: Well, would it be your preference to  
17 have overnight to think about how to respond to the  
18 objectors' concerns regarding ripeness?

19 MR. TROY: Sure. I can do that.

20 THE COURT: Would that be your preference?

21 MR. TROY: That would be, yeah, a more fulsome  
22 discussion, I think.

23 THE COURT: All right. Then you are excused, and I  
24 will hear from you tomorrow regarding that. Do you want to  
25 stop for the day now and pick it up tomorrow?

1 MR. BENNETT: Your pleasure, your Honor. I can keep  
2 going, but I can also stop. I'm not going to -- I don't  
3 have -- less than 30 minutes left, in fact, significantly  
4 less than 30 minutes left.

5 THE COURT: Well, do you think you can finish in the  
6 20 minutes that are left before five?

7 MR. BENNETT: I'll try.

8 THE COURT: All right. Then I would invite you to  
9 try.

10 MR. BENNETT: Let me just get a little bit  
11 reorganized. Okay. The next topic on my list is collateral  
12 estoppel, and, your Honor, I think with respect to collateral  
13 estoppel, a couple of points are worth focusing on. First of  
14 all, our very, very first point on this -- and I think it's  
15 dispositive -- is that when this case was filed, this Court  
16 had the most exclusive jurisdiction it ever gets about  
17 anything, absolutely exclusive interest -- exclusive  
18 jurisdiction under 1334(a) to decide matters in the case, and  
19 eligibility is a matter in the case. And the assertion by  
20 the objectors is that the Webster court really didn't decide  
21 eligibility. The Webster court was deciding some abstract  
22 issues of state law. And, your Honor, two things. Number  
23 one, the objectors can't even say that without mentioning the  
24 eligibility determination, and here I'm looking at the  
25 funds -- Mr. Gordon's brief at page 32. The Webster judgment

1 rules squarely on the constitutionality of PA 436 and the  
2 governor's authorization of the emergency manager to proceed  
3 under Chapter 9 in light of the pensions clause of the  
4 Michigan Constitution. There was absolutely no confusion in  
5 the judge's mind or anyone around that courtroom's mind that  
6 what they were trying to do was to get an early determination  
7 of eligibility. It might have succeeded, but this case was  
8 actually filed first. And by the way, although the attorney  
9 general will probably have more to say about this, there was  
10 no adjournment sought for purposes of filing the Chapter 9  
11 case, and the transcript shows no such thing. And they know  
12 more about the circumstances than I do, and they can address  
13 it tomorrow when it's their turn.

14 But there's an even more important point, which is  
15 that the order that was entered by the judge purports to  
16 enjoin the emergency manager directing him to have the case  
17 dismissed and not file another one, so I just -- I can't  
18 abide the assertion and the record does not support the  
19 assertion that what happened in that court was not an effort  
20 at an eligibility determination, so, number one, that was  
21 within the exclusive jurisdiction of this Court. If it was  
22 within the exclusive jurisdiction of this Court, it wasn't  
23 within the jurisdiction of that Court to do anything about  
24 it, and, therefore, any judgment that was entered after the  
25 filing for that reason alone is void.

1           Now, second point we make is that the automatic stay  
2 applied as well because the entire event, even though the  
3 city was not a party, was an effort to gain control over the  
4 city's assets and an effort to enhance collection of the  
5 debt. Again, there can't be much dispute about that, open  
6 paren, one, partly because of the way the whole proceeding  
7 evolved and how everyone understood it, but more importantly,  
8 here again we have the judge explicitly talking about the  
9 Chapter 9 case and attempting to stop the Chapter 9 case  
10 because of the perception that the Chapter 9 case might  
11 impair pensions, and those kinds of acts are clearly within  
12 the automatic stay. Again, I think that the --

13           THE COURT: Just to be clear, you're talking about  
14 the automatic stay of Section 362 --

15           MR. BENNETT: Yes.

16           THE COURT: -- the Bankruptcy Code.

17           MR. BENNETT: Correct, the Bankruptcy Code's  
18 automatic stay, or 942. The other half of it is in the -- is  
19 in Chapter 9 as well.

20           Full and fair opportunity to litigate. Again, I  
21 would ask the Court to look at the record in that case.  
22 There had been -- it is certainly true that a whole bunch of  
23 briefs that were filed -- I don't think the hearing where  
24 this all occurred had previously been calendared and noticed  
25 to anybody. The hearing was set on an emergency basis, and

1 someone got on the phone and called for the attorney  
2 general's office because they thought it might be a good idea  
3 to tell him about it about an hour before the hearing.  
4 That's actually not the way things are fully and fairly  
5 litigated in any courts I visit, and I don't think that when  
6 your Honor ticks through the procedural elements of what  
7 happened in that case in Lansing is going to be convinced  
8 that there was a full and fair opportunity to litigate.

9 THE COURT: Let me ask you just a sort of  
10 administrative question regarding this. Do we have in our  
11 record here all of the pleadings and papers and dockets and  
12 transcripts from that case?

13 MR. BENNETT: I don't know if they're there yet.

14 MS. NELSON: I believe I can answer that, your  
15 Honor. Assistant Attorney General Margaret Nelson. It's my  
16 understanding, no, those have not been submitted. I do have  
17 all of the transcripts, which I was prepared to present to  
18 the Court when I make my argument, which now appears to be  
19 tomorrow. If the Court would like the submission of the  
20 pleadings, we'll be happy to do that, although it's --

21 THE COURT: Well, my understanding is that some of  
22 the pleadings have been attached to various briefs, but I'm  
23 just not sure if it's everything.

24 MS. NELSON: There was only a -- there was --

25 THE COURT: Just to --

1 MR. BENNETT: We'll get it in.

2 THE COURT: Yeah, exactly. Just to be complete --

3 MS. NELSON: Yes.

4 THE COURT: -- let me make my request to you that  
5 our record here include everything from that case, including  
6 the docket.

7 MS. NELSON: There's three cases, your Honor.

8 THE COURT: Okay.

9 MS. NELSON: And so -- that were filed separately --

10 THE COURT: Well, but I think the --

11 MS. NELSON: -- so I will submit everything --

12 THE COURT: I think the one that's at issue here is  
13 the one in which a judgment was entered.

14 MS. NELSON: Correct.

15 THE COURT: That's the one I need.

16 MS. NELSON: So you want everything in the case in  
17 which the judgment was entered the next day, including the  
18 docket entries.

19 THE COURT: Thank you.

20 MS. NELSON: Would you also like the Court of  
21 Appeals materials --

22 THE COURT: Yes.

23 MS. NELSON: -- because the Court of Appeals  
24 materials were --

25 THE COURT: Yes.

1 MS. NELSON: -- filed and a stay order entered  
2 thereto?

3 THE COURT: Just for --

4 MS. NELSON: Webster?

5 THE COURT: For completeness, yeah. All right. I  
6 have to -- I have to pause here. I've been advised that the  
7 people in our overflow room couldn't hear this exchange, so I  
8 will just restate it for the record. The attorney general's  
9 representative has agreed to provide to the Court in this  
10 case the complete record from the Webster litigation not only  
11 at the trial court level but at the Court of Appeals level,  
12 including all pleadings and papers, transcripts, and docket  
13 entries, the docket itself. You may proceed, sir.

14 MR. BENNETT: Okay. Lastly, the last factor with  
15 respect to collateral estoppel, your Honor, is the issue of  
16 whether or not the judgment would be binding on the city in  
17 any event. Of course, the city was not a party to those  
18 proceedings. The assertion is made that the -- that there is  
19 privity between the city and the state because they have a  
20 common legal interest in some matters in connection with this  
21 Chapter 9 case. Frankly, I don't think those are the same  
22 standard, and I think we covered that in our papers, but I  
23 will say one other thing is that to the extent that there --  
24 that the plaintiffs in those cases believed that the city was  
25 in privity with the state with respect to those cases is an



1 additional reason why the automatic stay applied from the  
2 very beginning because if they thought that they were in a  
3 case with the state really trying to bind the city, then it  
4 is perfectly clear that they violated the automatic stay.

5 I don't think I have any other material topics that  
6 I think we need to cover based upon the argument by others.  
7 If I've missed something or if your Honor has any questions,  
8 I'd be happy to take them. Otherwise I'll allow the attorney  
9 general to take the floor tomorrow.

10 THE COURT: Um-hmm.

11 MR. BENNETT: We'll be done early.

12 THE COURT: Okay. Good. We'll be in recess now  
13 until 10 a.m. tomorrow morning.

14 MS. NELSON: Your Honor, before you leave the bench,  
15 may I just ask do you want those pleading -- do you want  
16 everything submitted electronically?

17 THE COURT: Yes, yes, in the record of this case.  
18 Thank you.

19 THE CLERK: All rise. Court is adjourned.

20 (Proceedings concluded at 4:51 p.m.)

## INDEX

WITNESSES:

None

EXHIBITS:

None

I certify that the foregoing is a correct transcript from the sound recording of the proceedings in the above-entitled matter.

/s/ Lois Garrett

October 20, 2013

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Lois Garrett

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
**TRANSCRIPT ORDER FORM**

111 First Street  
Bay City, MI 48708

211 W. Fort Street  
17th Floor  
Detroit, MI 48226

226 W. Second Street  
Flint, MI 48502

**Order Party: Name, Address and Telephone Number**

Name Syncora Guarantee & Syncora Capital Assurance

Firm Kirkland & Ellis LLP

Address 300 N. LaSalle

City, State, Zip Chicago, IL 60654

Phone 312.862.3200

Email dustin.paige@kirkland.com

**Case/Debtor Name:** City of Detroit, MI

**Case Number:** 13-53846

**Chapter:** 9

**Hearing Judge:** Hon. Steven Rhodes

☒ Bankruptcy ☐ Adversary

☐ Appeal Appeal No: \_\_\_\_\_

**Hearing Information** (A separate form must be completed for each hearing date requested.)

**Date of Hearing:** 11/27/2013 **Time of Hearing:** 9:00am **Title of Hearing:** Hearing re Detroit Bankruptcy

Please specify portion of hearing requested: ☒ Original/Unredacted ☐ Redacted ☐ Copy (2<sup>nd</sup> Party)

☒ Entire Hearing ☐ Ruling/Opinion of Judge ☐ Testimony of Witness ☐ Other

Special Instructions: \_\_\_\_\_

**Type of Request:**

- ☒ Ordinary Transcript - \$3.65 per page (30 calendar days)  
☐ 14-Day Transcript - \$4.25 per page (14 calendar days)  
☐ Expedited Transcript - \$4.85 per page (7 working days)  
☐ CD - \$30; FTR Gold format - You must download the free  
FTR Record Player™ onto your computer from  
[www.ftrgold.com](http://www.ftrgold.com)

**Signature of Ordering Party:**

Dustin Paige Date: 12/2/13  
By signing, I certify that I will pay all charges upon completion  
of the transcript request.

**FOR COURT USE ONLY**

Transcript To Be Prepared By \_\_\_\_\_

\_\_\_\_\_  
Date By

Order Received: \_\_\_\_\_

Transcript Ordered: \_\_\_\_\_

Transcript Received: \_\_\_\_\_

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN**

In re

CITY OF DETROIT, MICHIGAN,

Debtor.

)

) Chapter 9

)

) Case No. 13-53846

)

) Hon. Steven W. Rhodes

)

---

**MOTION OF THE OBJECTORS TO COMPEL THE PRODUCTION OF  
PRIVILEGE LOG**

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The Objectors<sup>1</sup> submit this motion to compel the production of a privilege log by the Debtor City of Detroit (the “City”) in connection with the City’s document production relating to the *Motion of the Debtor for a Final Order Pursuant to 11 U.S.C. §§105, 362, 364(c)(1), 364(c)(2), 364(e), 364(f), 503, 507(a)(2), 904, 921 and 922 (I) Approving Post-Petition Financing, (II) Granting Liens and Providing Superpriority Claim Status and (III) Modifying Automatic Stay* [Doc. No. 1520] (the “DIP Motion”) and pursuant to this Court’s November 15, 2013 Order [Doc. No. 1743], Syncora’s Request for the Production of

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<sup>1</sup> Syncora Guarantee Inc. and Syncora Capital Assurance Inc. (collectively, “Syncora”). Ambac Assurance Corporation, the Retiree Association Parties, Hypothekenbank Frankfurt AG, Hypothekenbank Frankfurt International S.A., and Erste Europäische Pfandbrief- und Kommunalkreditbank Aktiengesellschaft in Luxemburg S.A. (collectively “EEPK”), the Detroit Retired City Employees Association (“DRCEA”), the Retired Detroit Police and Fire Fighters Association (“RDPFFA”) (collectively the “Retiree Associations”), the Police and Fire Retirement System of the City of Detroit and the General Retirement System of the City of Detroit, and Financial Guaranty Insurance Company.

Documents [Doc. No. 1775], and Federal Rule of Bankruptcy Procedure 7026. In support of this motion, the Objectors respectfully represent as follows:

### **BACKGROUND**

1. On November 5, 2013, the City of Detroit filed the DIP Motion requesting approval for postpetition financing. In connection with the DIP Motion, certain objecting parties filed a Motion for Leave to Conduct Limited Discovery (the “DIP Discovery Motion”) [Doc. No. 1640]. The City opposed certain of the Objectors’ requested discovery.

2. On November 14, 2013, this Court held a hearing on the DIP Discovery Motion and issued an Order granting in part the DIP Discovery Motion [Doc. No. 1743]. Consistent with this Court’s Order granting in part the Objectors’ DIP Discovery Motion, Syncora filed its Request for the Production of Documents (“Document Requests”) with the Court pursuant to Local Bankruptcy Rule 7026-1 [Doc. No. 1775]. As part of its Document Requests, Syncora requested that, “[i]f the Debtor claims any that any privilege or protection excuses production of any document or part thereof, the Debtor must expressly make such claim in writing and provide a general description of the categories of documents being withheld and the basis for doing so, sufficient in detail for Syncora to determine whether there is an adequate basis for invoking privilege or protection.” (Document Requests at 5.)

3. The City produced documents to the Objectors on November 20, 2013. As part of this production, the City withheld multiple documents on privilege grounds. The City did not, however, provide a corresponding privilege log.

4. On December 2, 2013, counsel for Syncora requested that the City provide a privilege log in order to assess the City's privilege claims. In response to this request, counsel for the City stated that it had not planned to provide a privilege log. Counsel for Syncora noted that (a) it was entitled to receive such a log under the relevant Federal Rules of Bankruptcy Procedure and Federal Rules of Discovery and (b) a log was necessary, as a practical matter, to assess the City's privilege claims. The City ultimately stated that it did not intend to provide a privilege log, claiming that it had not agreed to do so and that it was not required to do so "under the rules."

5. In light of the City's refusal to comply with the Federal Rules of Bankruptcy Procedure, the Federal Rules of Civil Procedure, and the instructions in Syncora's Document Requests, the Objectors now seek to compel the production of a privilege log relating to the City's production of documents in connection with the DIP Motion.

## **JURISDICTION**

6. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue for this matter is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

## **RELIEF REQUESTED**

7. The Objectors respectfully request the entry of an order substantially in the form of Exhibit 1 attached herein compelling the City to produce a privilege log or, in the alternative, finding that the City has waived privilege with respect to the documents withheld on that basis.

## **BASIS FOR RELIEF**

8. Rule 26(b)(5) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7026, requires that a party claiming privilege must “describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.” *In re Cont'l Capital Inv. Servs., Inc.*, BR 03-3370, 2011 WL 4624678 (Bankr. N.D. Ohio Sept. 30, 2011).

9. A privilege log satisfies the requirements of Rule 26(b)(5). *See Hoxie v. Livingston Cnty.*, CIV.A. 09-CV-10725, 2009 WL 5171845 (E.D. Mich. Dec.

22, 2009) *objections overruled*, 09-CV-10725, 2010 WL 457104 (E.D. Mich. Feb. 3, 2010) (“The [Defendants] must produce an adequate privilege log listing any and all documents which they withhold by claiming a privilege. . . . The [Defendants’] privilege log should contain sufficient information for the Court and Plaintiff to determine whether the withheld documents are properly subject to a privilege or protection.”) (internal quotations and citations omitted). Moreover, in the absence of a privilege log, a court may consider the privilege claimed by party waived. *Id.* (“The Court can reject the claim of privilege where the party invoking the privilege does not provide sufficient detail to demonstrate fulfillment of all the legal requirements for application of the privilege.”)

10. Although the City has withheld a number of responsive documents on privilege grounds, it has not provided any reason or basis for its privilege claims. In so doing, the City has violated Federal Rule of Civil Procedure 26(b)(5) and Federal Rule of Bankruptcy Procedure 7026.

11. Thus, while the City is intent on moving forward with the DIP Motion in an expedited fashion — and has objected to the Objectors’ attempts to obtain all of the discovery that is necessary to adequately assess the transaction at issue — it remains unwilling to comply with its most basic discovery obligations vis-à-vis the limited discovery it has agreed to provide.



12. Accordingly, the Objectors respectfully request that the Court compel the production of a privilege log that contains sufficient information to meet the requirements of Rule 26(b)(5) or, in the alternative, reject the City's claim of privilege given the City's failure to demonstrate any basis for its claims.

### **STATEMENT OF CONCURRENCE SOUGHT**

13. Local Bankruptcy Rule 9014-1 provides that "in a bankruptcy case unless it is unduly burdensome, the motion shall affirmatively state that concurrence of opposing counsel in the relief sought has been requested on a specified date and that the concurrence was denied." Local Rule 9014-1(g).

14. Counsel for Syncora sought concurrence from opposing counsel for the relief requested in this motion on December 2, 2013. Counsel for the City did not agree to produce a privilege log.

### **RESERVATION OF RIGHTS**

15. The Objectors file this motion without prejudice or waiver of their rights under the Bankruptcy Code.

WHEREFORE, the Objectors respectfully request that this Court (a) enter an order substantially in the form attached hereto as Exhibit 1, granting the relief sought herein; and (b) grant such other and further relief as the Court may deem proper.

Dated: December 2, 2013

/s/ Stephen C. Hackney

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*Attorneys for Financial Guaranty Insurance  
Company*

## **SUMMARY OF ATTACHMENTS**

- Exhibit 1 Proposed Form of Order
- Exhibit 2 Notice of Motion and Opportunity to Object
- Exhibit 3 None [Brief not Required]
- Exhibit 4 Certificate of Service
- Exhibit 5 Affidavits [Not Applicable]
- Exhibit 6 Documentary Exhibits [Not Applicable]

**Exhibit 1**  
**Proposed Order**

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN**

In re	)	
	)	Chapter 9
	)	
CITY OF DETROIT, MICHIGAN,	)	Case No. 13-53846
	)	
Debtor.	)	Hon. Steven W. Rhodes
	)	

---

**ORDER GRANTING THE OBJECTORS' MOTION  
TO COMPEL THE PRODUCTION OF A PRIVILEGE LOG**

---

This matter coming before the Court on the motion of the Objectors<sup>1</sup> to compel production of a privilege log in connection with the *Motion of the Debtor for a Final Order Pursuant to 11 U.S.C. §§105, 362, 364(c)(1), 364(c)2, 364(e), 364(f), 503, 507(a)(2), 904, 921 and 922 (I) Approving Post-Petition Financing, (II) Granting Liens and Providing Superpriority Claim Status and (III) Modifying Automatic Stay* (the “DIP Motion”) and entering an order compelling the production of a privilege log; the Court having reviewed the Objectors’ Motion; and the Court having determined that the legal and factual bases set forth in the motion establish just cause for the relief granted herein;

**IT IS HEREBY ORDERED THAT:**

1. The Objectors’ motion is GRANTED.

---

<sup>1</sup> Capitalized terms not otherwise defined herein have the meanings given to them in the Objectors’ Motion to Compel the Production of a Privilege Log.



2. The City must produce a privilege log setting forth the reasons for claiming privilege over any documents produced to the Objectors in connection with the DIP Motion.

3. The Objectors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the motion.

4. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

5. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

**IT IS SO ORDERED.**

---

STEVEN W. RHODES  
United States Bankruptcy Judge

## **Exhibit 2**

### **Notice of Motion and Opportunity to Object**

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN**

In re	)	
	)	Chapter 9
	)	
CITY OF DETROIT, MICHIGAN,	)	Case No. 13-53846
	)	
Debtor.	)	Hon. Steven W. Rhodes
	)	

---

**NOTICE OF MOTION OF THE OBJECTORS TO  
COMPEL THE PRODUCTION OF PRIVILEGE LOG**

---

**PLEASE TAKE NOTICE** that on December 2, 2013, the Objectors filed the *Motion of the Objectors to Compel the Production of Privilege Log* (the “Motion”) in the United States Bankruptcy Court for the Eastern District of Michigan (the “Bankruptcy Court”) seeking entry of an order compelling the City of Detroit (the “City”) to produce a privilege log or, in the alternative, finding that the City has waived privilege with respect to the documents withheld on that basis.

**PLEASE TAKE FURTHER NOTICE** that your rights may be affected by the relief sought in the Motion. You should read these papers carefully and discuss them with your attorney, if you have one. If you do not have an attorney, you may wish to consult one.

**PLEASE TAKE FURTHER NOTICE** that if you do not want the Bankruptcy Court to grant the Objectors’ Motion or you want the Bankruptcy Court to consider your views on the Motion, by **December 17, 2013**, you or your attorney must:<sup>1</sup>

---

<sup>1</sup> Concurrently herewith, the Objectors are seeking expedited consideration and shortened notice of the Motion. If the Court grants such expedited consideration and shortened notice, the Objectors will file and serve notice of the new response deadline.

File with the Bankruptcy Court a written response to the Motion, explaining your position, electronically through the Bankruptcy Court's electronic case filing system in accordance with the Local Rules of the Bankruptcy Court or by mailing any objection or response to:<sup>2</sup>

United States Bankruptcy Court  
Theodore Levin Courthouse  
231 West Lafayette Street  
Detroit, MI 48226

You must also serve a copy of any objection or response upon:

James H.M. Sprayregen, P.C.  
Ryan Blaine Bennett  
Stephen C. Hackney  
KIRKLAND & ELLIS LLP  
300 North LaSalle  
Chicago, Illinois 60654  
Telephone: (312) 862-2000  
Facsimile: (312) 862-2200

- and -

Stephen M. Gross  
David A. Agay  
Joshua Gadharf  
MCDONALD HOPKINS PLC  
39533 Woodward Avenue  
Bloomfield Hills, MI 48304  
Telephone: (248) 646-5070  
Facsimile: (248) 646-5075

If an objection or response is timely filed and served, the clerk will schedule a hearing on the Motion and you will be served with a notice of the date, time and location of the hearing.

**PLEASE TAKE FURTHER NOTICE that if you or your attorney do not take these steps, the court may decide that you do not oppose the relief sought in the Motion and may enter an order granting such relief.**

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<sup>2</sup> A response must comply with F. R. Civ. P. 8(b), (c) and (e).

Dated: December 2, 2013

/s/ *Stephen C. Hackney*

---

James H.M. Sprayregen, P.C.

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*Attorneys for Syncora Guarantee Inc. and Syncora  
Capital Assurance Inc.*

**Exhibit 3**

**None [Brief Not Required]**

**Exhibit 4**

**None [Separate Certificate of Service to be Filed]**

**Exhibit 5**  
**Affidavits**  
**[Not Applicable]**



**Exhibit 6**

**Documentary Exhibits  
[Not Applicable]**

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN**

In re

CITY OF DETROIT, MICHIGAN,

Debtor.

)

) Chapter 9

)

) Case No. 13-53846

)

) Hon. Steven W. Rhodes

)

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**SYNCORA GUARANTEE INC. AND SYNCORA CAPITAL ASSURANCE  
INC.'S DISCLOSURE OF EXHIBITS IN ADVANCE OF THE HEARING  
ON DECEMBER 17-19, 2013**

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On November 27, 2013 the Court held a hearing (the “Hearing”) regarding Debtor’s Motion for Entry of an Order Establishing Pre-Trial and Trial Procedures and Setting Additional Hearings and certain objections thereto (Dkt. Nos. 1821-1822). In accordance with the statements of counsel during the Hearing and by agreement of the parties, Syncora Guarantee Inc. and Syncora Capital Assurance Inc. (collectively, “Syncora”) file this disclosure of exhibits that it may use during the hearing on the City’s Assumption Motion (Dkt. Nos. 17 and 157) and Motion to Approve Post-Petition Financing (Dkt. No. 1520) (the “Consolidated Hearing”).

**Documents**

Syncora may introduce the following documents as part of its examination of the City’s witnesses or Syncora’s witnesses during the Consolidated Hearing. Syncora reserves the right to use or refer to any of the City’s exhibits or any of the exhibits of the other objectors.

No.	Exhibit Description
1	1992 ISDA Master Agreement Local Currency Single Jurisdiction, dated as of May 25, 2005 between UBS and the GRS Service Corporation
2	June 7, 2006 SBS and UBS ISDA Master Agreements Local Currency Single Jurisdiction and corresponding Schedules
3	June 26, 2009 SBS and UBS Amended and Restated Schedules to the 1992 ISDA Master Agreements Local Currency Single Jurisdiction dated as of June 7, 2006
4	Waiver and Consent of FGIC, dated June 26, 2009 (Pérez Decl. Ex. T)
5	Waiver and Consent of Syncora, dated June 26, 2009
6	Detroit City Code § 18-16-4
7	June 15, 2009 Collateral Agreement
8	July 15, 2013 Forbearance and Optional Termination Agreement
9	XL Capital Assurance Swap Insurance Policy Numbers CA03049E, CA03049D, CA03049C and CA03049B, dated June 12, 2006
10	GRS Service Contract 2005 dated May 25, 2005, between the Detroit General Retirement System Service Corporation and the City
11	PFRS Service Contract 2005 dated May 25, 2005 between the Detroit Police and Fire Retirement System Service Corporation and the City
12	GRS Service Contract 2006 dated June 7, 2006, as amended on June 15, 2009 (Pérez Decl. Ex. G)
13	PFRS Service Contract 2006 dated June 7, 2006, as amended on June 15, 2009 (Pérez Decl. Ex. H)
14	Contract Administration Agreement, dated June 12, 2006
15	Trust Agreement, dated June 12, 2006, by and among the Service Corporations and U.S. Bank National Association as Trustee
16	XL Capital Assurance Municipal Bond Insurance Policy CA03049A, dated June 12, 2006

No.	Exhibit Description
17	U.S. Bank Notice of Event of Default Regarding the City of Detroit, Michigan to Swap Counterparties and Ratings Agencies dated July 26, 2013
18	U.S. Bank Notice of Bankruptcy Filing to Beneficial Holders of Series 2005-A and 2006-B Certificates of Participation dated July 26, 2013
19	U.S. Bank Notice of Bankruptcy Filing to Beneficial Holders of Series 2006-A and 2006-B Certificates of Participation dated July 26, 2013
20	City Ordinance No. 03-05 (Pérez Decl. Ex. A)
21	City Ordinance 04-05 (Pérez Decl. Ex. B)
22	City Ordinance No. 05-05 (Pérez Decl. Ex. C)
23	City Ordinance No. 05-09 (Pérez Decl. Ex. Q)
24	FGIC Municipal Bond New Issue Insurance Policy Number 06010249, dated June 12, 2006 (Pérez Decl. Ex. J)
25	FGIC Municipal Bond New Issue Insurance Policy Number 06010250, dated June 12, 2006 (Pérez Decl. Ex. K)
26	Revised Confirmation to the GRS Service Corporation from UBS, dated June 26, 2009 (Pérez Decl. Ex. N)
27	Revised Confirmation to the PFRS Service Corporation from UBS, dated June 26, 2009 (Pérez Decl. Ex. O)
28	FGIC Swap Surety Policy Number 0602052 dated June 12, 2006 (Pérez Decl. Ex. P)
29	FGIC Swap Surety Policy Numbers 06010253, 06010254 and 06010255, dated June 12, 2006
30	Assignment of Swap Transactions with PFRS Service Corporation, dated July 19, 2013; Assignment of Swap Transactions with GRS Service Corporation, dated July 19, 2013 (Pérez Decl. Ex. L)
31	Project Piston Cash Flow Forecast - monthly (FY 2013, FY 2014, FY 2015), as of June 21, 2013

No.	Exhibit Description
32	U.S. Bank Notice of Bankruptcy Filing to Beneficial Holders of Series 2005-A Certificates of Participation dated July 26, 2013
33	U.S. Bank Notice of Bankruptcy Filing to Beneficial Holders of Series 2006-A and 2006-B Certificates of Participation dated July 26, 2013
34	Jones Day - Syncora NDA (Swap Proposal) dated July 10, 2013
35	Forbearance and Optional Termination Agreement term sheet
36	Email from Cheryl Johnson to A. Neely re Status of Swap dated December 3, 2012
37	Email from Reuters to Press Secretary re Status of Swap Contract dated November 30, 2012
38	Joint Stipulation of Facts of Syncora Guarantee Inc. and Syncora Capital Assurance Inc. and U.S. Bank National Association
39	Declaration of Charles Moore In Support of DIP Motion (Exhibit 5A to DIP Motion)
40	Declaration of James Doak In Support of DIP Motion (Exhibit 5B to DIP Motion)
41	Barclays Commitment Letter (Exhibit 6A to DIP Motion)
42	Bond Purchase Agreement (Exhibit 6B to DIP Motion)
43	Financial Recovery Bond Trust Indenture (Exhibit 6C to DIP Motion)
44	Emergency Manager Order No. 17 (Exhibit 7 to DIP Motion)
45	June 13, 2013 Correspondence from the City to U.S. Bank National Association ("USBNA")
46	June 17, 2013 correspondence from Syncora Capital Assurance, Inc. ("Syncora") to USBNA
47	June 24, 2013 correspondence between and among counsel to USBNA, Syncora and the City
48	June 24, 2013 correspondence from Syncora's counsel to counsel to USBNA

No.	Exhibit Description
49	June 26, 2013 correspondence from the Syncora to the City
50	July 15, 2013 correspondence from Syncora to SBS Financial Product Company, LLC (“SBS”)
51	July 16, 2013 correspondence from Syncora to the City
52	January 13, 2013 City of Detroit, Michigan Notice of Preliminary Financial Review Findings and Appointment of a Financial Review Team (Orr Declaration Ex. C)
53	March 26, 2013 Report of the Detroit Financial Review Team (Orr Declaration Ex. D)
54	April 4, 2012 Financial Stability Agreement (Orr Declaration Ex. E)
55	December 14, 2012 Preliminary Review of the City of Detroit (Orr Declaration Ex. F)
56	February 19, 2013 Report of the Detroit Financial Review Team (Orr Declaration Ex. G)
57	March 1, 2013 letter from Governor Richard Snyder to the City (Orr Declaration Ex. H)
58	Exit Engagement Letter (Exhibit B to Syncora Objection to DIP Motion)
59	Email from Anne Marie Langan to Todd Snyder (Exhibit C to Syncora Objection to DIP Motion)
60	Moody’s Report (Exhibit E to Syncora Objection to DIP Motion)
61	Funding for Detroit Announced on Sept. 27, 2013 (Exhibit F to Syncora Objection to DIP Motion)
62	Cash Flow Variance Report June 2013 (Exhibit G to Syncora Objection to DIP Motion)
63	Cash Flow Variance Report FY 2014 (Exhibit H to Syncora Objection to DIP Motion)
64	Syncora Proposal (Exhibit I to Syncora Objection to DIP Motion)

No.	Exhibit Description
65	Professional Service Contract Transmittal Record (Moore Dep. Ex. 1)
66	June 14, 2013 Creditor Proposal (Moore Dep. Ex. 3)
67	Detroit Police Times No Guide to Effectiveness news article (Moore Dep. Ex. 4)
68	Detroit Police Dashboard (Moore Dep. Ex. 5)
69	City of Detroit Operational Restructuring Summary, dated November 11, 2013 (Moore Dep. Ex. 7)
70	City of Detroit Restructuring Priorities (DTPPF0012709) (Moore Dep. Ex. 8)
71	Project Piston Cash Flow Forecast -Through FY 2017 (DTPPF0020055) (Moore Dep. Ex. 9)
72	Key Operational Updates as of September 24, 2013 (DTPPF00011728) (Moore Dep. Ex. 10)
73	Request for the Amendment to the FY 2014 Budget of the City of Detroit (Moore Dep. Ex. 11)
74	Letter Dated August 26, 2013 with attached term sheets (DTPPF00016682) (Doak Dep. Ex. 2)
75	Detroit Post-Petition Financing Briefing Materials for City Council (DTPPF00012993) (Doak Dep. Ex. 3)
76	Detroit Post-Petition Financing Briefing Materials Prepared for Members of City Council (DTPPF00020039) (Doak Dep. Ex. 4)
77	Post-Petition Financing Discussion (DTPPF00020215) (Doak Dep. Ex. 5)
78	Barclays Fee Letter (Doak Dep. Ex. 12)
79	Detroit Post-Petition Financing Materials for Financial Advisory Board, dated 11/4/13 (DTPPF00001959) (Doak Dep. Ex. 14)
80	Email from Thomas Gavin to James Doak (Doak Dep. Ex. 15)

No.	Exhibit Description
81	City of Detroit Post-Petition Financing Contact List (DTPPF00016847)
82	Detroit PPF All-In Cost Analysis (DTPPF00013761)
83	6/22/13 email from K. Buckfire (DTMI80335)
84	7/5/13 email from Erin Smith (DTMI00107294)
85	7/5/13 email from Bill Nowling (DTMI00111238)
86	Abernathy MacGregor Invoice (DTMI00112208)
87	Syncora and FGIC Outline of Terms and Conditions (DTPPF00000191)
88	6/12/13 email from Andrew Dillon (DTMI00114984)
89	6/24/13 email from Kevyn Orr (DTMI00114531)
90	6/29/13 email from Kevyn Orr (DTMI00101514)
91	6/24/13 email from Kevyn Orr (DTMI00115562)
92	June 14, 2013 Proposal to Creditors
93	June 14, 2013 Proposal to Creditors (Executive Summary)
94	Responses to Inquiries from City Council (DTPPF00020357)

Syncora reserves the right to supplement this list with additional documents including, but not limited to, any documents utilized in the depositions of witnesses in connection with the Consolidated Hearing.



Dated: December 9, 2013

Respectfully submitted,

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**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

	-----X	
	:	
In re	:	Chapter 9
	:	
CITY OF DETROIT, MICHIGAN,	:	Case No. 13-53846
	:	
Debtor.	:	Hon. Steven W. Rhodes
	:	
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**DEBTOR’S LIST OF EXHIBITS FOR HEARING ON THE CITY OF  
DETROIT’S ASSUMPTION MOTION [DKTS. 17 AND 157] AND MOTION  
TO APPROVE POST-PETITION FINANCING [DKT. 1520]**

1. As contemplated by the proposed Scheduling Order filed by the City on December 6, 2013, and for purposes of the hearing on the City’s Assumption Motion [Dkts. # 17, #157] and Motion to Approve Post-Petition Financing [Dkt. 1520] (together, the “City’s Motions”), scheduled to take place on December 17, 18 and 19, 2013, the City identifies the following exhibits that it may use at the Evidentiary Hearings related to the City’s Motions.

City’s Exhibit No.	Exhibit Description
1.	June 7, 2006, ISDA Master Agreement between UBS AG and Detroit General Retirement System (“GRS”) Service Corporation (Local Currency Single Jurisdiction), and related Schedule
2.	June 7, 2006. ISDA Master Agreement between SBS Financial Products Company, LLC (“SBS”) and GRS Service Corporation (Local Currency Single Jurisdiction), and related

City's Exhibit No.	Exhibit Description
	Schedule
3.	March 30, 2009, Term Sheet: Summary of Terms for Settlement between SBS, Merrill Lynch Capital Services, Inc., and UBS AG (collectively, the "Counterparties), and GRS Service Corporation and the Detroit Police and Fire Retirement System ("PFRS") Service Corporation (collectively the "Service Corporations)
4.	June 26, 2009, SBS and GRS Service Corporation Amended and Restated Schedules to 1992 ISDA Master Agreement Local Currency Single Jurisdiction dated as of June 7, 2006
5.	June 26, 2009, UBS AG and GRS Service Corporation Amended and Restated Schedule to the 1992 ISDA Master Agreement Local Currency Single Jurisdiction dated as of June 7, 2006
6.	June 26, 2009, Waiver and Consent of Insurer Syncora, with Exhibits
7.	Detroit, Mich. Code § 18-16-4
8.	July 5, 2013, Transcript of Hearing, City of Detroit v. Syncora, No. 13-008858-CZ, 3 <sup>rd</sup> Cir. Ct. Co. of Wayne (Hon. A. J. Berry, presiding)
9.	July 4, 2013, Affidavit of Kevyn D. Orr, City of Detroit v. Syncora Guar. Inc., No.: 2:13-cv-12987 (E.D. Mich)
10.	June 14, 2013, City of Detroit ("City") Proposal for Creditors Executive Summary
11.	June 15, 2009, Collateral Agreement among the City, the Service Corporations, and U. S. Bank National.Association ("USBNA")
12.	June 13, 2013, Letter from Orr to USBNA regarding Written Instructions to Custodian Under Collateral Agreement
13.	June 17, 2013, Letter from LeBlanc (Syncora) to USBNA regarding Collateral Agreement dated June 15, 2009 regarding Detroit Retirement Systems with U.S. Bank as Custodian
14.	June 24, 2013, Email from Bennett (Syncora) to Smith (USBNA) regarding USB – Detroit – Casino Revenue Collateral Account, forwarding June 24, 2013 email from Smith to Ball.

<b>City's Exhibit No.</b>	<b>Exhibit Description</b>
15.	June 24, 2013, Letter from Bennett (Syncora) to Smith (USBNA) regarding General Receipts Subaccount under the Collateral Agreement dated June 15, 2009
16.	June 25, 2013, Letter from Orr to Syncora regarding Instructions to Custodian under Collateral Agreement
17.	June 26, 2013, Letter from LeBlanc (Syncora) to the City regarding Instructions to Custodian Under Collateral Agreement
18.	July 15, 2013, Forbearance and Optional Termination Agreement among the Service Corporations, the City, the Emergency Manager, UBS AG, and Merrill Lynch Capital Services, Inc.
19.	July 15, 2013, Letter from Lundy (Syncora) to SBS
20.	July 16, 2013, Letter from LeBlanc (Syncora) to Orr
21.	July 17, 2013, Letter from Orr to LeBlanc (Syncora) regarding July 16 Letter
22.	July 17, 2013, Letter from Carter (SBS) to Lundy (Syncora)
23.	July 18, 2013, Declaration of Gaurav Malhotra In Support of City of Detroit, Michigan's Statement of Qualifications Pursuant to Section 109(c) of the Bankruptcy Code (the "Malhotra Declaration")
24.	Annual Cash Flow Summary FY 2012-FY 2015; Monthly Cash Flow Forecast FY 2014 and FY 2015 – Base Case [Malhotra Declaration Ex. A]
25.	Ten-Year Financial Projections [Malhotra Declaration Ex. B]
26.	Legacy Expenditures (Assuming No Restructuring) [Malhotra Declaration Ex. C]
27.	Schedule of the sewage disposal system bonds and related state revolving loans as of June 30, 2012 [Malhotra Declaration Ex. D]
28.	Schedule of water system bonds and related state revolving loans as of June 30, 2012 [Malhotra Declaration Ex. E]
29.	Annual Debt Service on Revenue Bonds [Malhotra Declaration Ex. F]

City's Exhibit No.	Exhibit Description
30.	Schedule of COPs and Swap Contracts as of June 30, 2012 [Malhotra Declaration Ex. G]
31.	Annual Debt Service on COPs and Swap Contracts [Malhotra Declaration Ex. H]
32.	Schedule of UTGO Bonds as of June 30, 2012 [Malhotra Declaration Ex. I]
33.	Schedule of LTGO Bonds as of June 30, 2012 [Malhotra Declaration Ex. J]
34.	Annual Debt Service on General Obligation Debt & Other Liabilities [Malhotra Declaration Ex. K]
35.	July 18, 2013, Declaration of Kevyn D. Orr In Support of City of Detroit, Michigan's Statement of Qualifications Pursuant to Section 109(c) of the Bankruptcy Code (the "Orr Declaration")
36.	June 14, 2013, City of Detroit Proposal for Creditors [Orr Declaration Ex. A]
37.	January 13, 2013, City of Detroit, Michigan Notice of Preliminary Financial Review Findings and Appointment of a Financial Review Team [Orr Declaration Ex. C]
38.	March 26, 2013, Report of the Detroit Financial Review Team [Orr Declaration Ex. D]
39.	April 4, 2012, Financial Stability Agreement Between the City and the Michigan Department of Treasury [Orr Declaration Ex. E]
40.	December 14, 2012, Preliminary Review of the City of Detroit [Orr Declaration Ex. F]
41.	February 19, 2013, Report of the Detroit Financial Review Team; Supplemental Documentation of the Detroit Financial Review Team [Orr Declaration Ex. G]
42.	March 1, 2013, Letter from Governor Snyder to Bing and the City Council [Orr Declaration Ex. H]
43.	July 8, 2013, Ambac Comments on Detroit [Orr Declaration Ex. I]
44.	July 16, 2013, Letter from Orr to Governor Snyder and Treasurer Dillon regarding Recommendation Pursuant to Section 18(1) of PA 436 [Orr Declaration Ex. J]
45.	July 18, 2013, Letter from Governor Snyder to Orr and

City's Exhibit No.	Exhibit Description
	Treasurer Dillon regarding Authorization to Commence Chapter 9 Bankruptcy Proceeding [Orr Declaration Ex. K]
46.	July 18, 2013, Emergency Manager Order No. 13 Filing of a Petition Under Chapter 9 of Title 11 of the United States Code [Orr Declaration Ex. L]
47.	June 12, 2006, UBS AG Insurance Policies for Scheduled Payments of GRS Service Corporation under June 7, 2006 Master Agreement
48.	June 12, 2006, SBS Insurance Policies for Scheduled Paymentw of GRS Service Corporation under June 7, 2006 Master Agreement
49.	2009 Moody's and Standard & Poor's Ratings of Syncora obtained from Syncora's website ( <a href="http://syncora.com/?page_id=78">http://syncora.com/?page_id=78</a> )
50.	July 31, 2013, First Amendment to Forbearance and Optional Termination Agreement
51.	August 12, 2013, Second Amendment to Forbearance and Optional Termination Agreement
52.	August 23, 2013, Third Amendment to Forbearance and Optional Termination Agreement
53.	August 29, 2013, Fourth Amendment to Forbearance and Optional Termination Agreement
54.	September 4, 2013, Fifth Amendment to Forbearance and Optional Termination Agreement
55.	October 15, 2013, Letter from Orr to Treasurer Dillon enclosing Quarterly Report of the Emergency Manager Pursuant to Section 9(5) of PA 436.
56.	September 3, 2013, E-mail from Doak to Gerbino regarding City of Detroit Financing, including attachments of September 3, 2013, Letter from Miller Buckfire to Gerbino, July 15, 2013, Forbearance and Optional Termination Agreement, and Undated Model "Summary of Certain Key Terms and Conditions" [DTPFF00015602- DTPFF00015638]
57.	September 4, 2013, Ernst & Young, Project Piston 13-Week Cash Flow Forecast (DIP Financing Scenario) [DTPFF00002227- DTPFF00002230]
58.	September 4, 2013, Ernst & Young, Project Piston Cash Flow Forecast Through FY 2017 (DIP Financing Scenario)

City's Exhibit No.	Exhibit Description
	[DTPFF00014812- DTPFF00014824]
59.	September 30, 2013, Ernst & Young, 13-Week Cash Flow Forecast – Restructuring Scenario (including reinvestment; DIP transaction assumed after 12/31) [DTPFF00002232]
60.	October 2013, Ernst & Young, Project Piston, Comparison of DIP vs. Creditor Plan Restructuring [DTPFF00002226]
61.	July 5, 2013, Response to City of Detroit Financing RFP from J.P. Morgan [DTPFF00000624-DTPFF00000633]
62.	July 5, 2013, Letter from Brownstein to Corio regarding Citibank, N.A, Response to City of Detroit Financing RFP [DTPFF00000650-DTPFF00000656]
63.	September 16, 2013, Goldman Sachs “Summary of Certain Key Terms and Conditions,” and related documents, responding to City of Detroit Financing RFP [DTPFF00000985-DTPFF00001005]
64.	September 16, 2013, Letter from Klein and Flanagan to Corio, and related documents, regarding Jefferies LLC response to City of Detroit Financing RFP [DTPFF00001011-DTPFF00001039]
65.	September 2013, Deutsche Bank “City of Detroit discussion materials” responding to City of Detroit Financing RFP [DTPFF00000944-DTPFF00000958]
66.	Undated, Canyon Capital Advisors LLC “Summary of Key Terms and Conditions” responding to City of Detroit Financing RFP. [DTPFF00000903-DTPFF00000907]
67.	September 16, 2013, Letters from Ambac Assurance Corporation, Assured Guaranty Municipal Corp., and National Public Finance Guarantee Corporation, with attached “Summary of Certain Key Terms and Conditions” responding to City of Detroit Financing RFP [DTPFF00000826-DTPFF00000837]
68.	September 16, 2013, Letter from Marc Sole to Miller Buckfire, attaching Hudson Bay Capital Management LP “Summary of Certain Key Terms and Conditions” in response to City of Detroit Financing RFP.[DTPFF00001006-DTPFF00001010]
69.	September 16, 2013, Letter from Fundamental Advisors LP to Corio, attaching “Indicative Summary of Certain Key Terms



City's Exhibit No.	Exhibit Description
	and Conditions,” responding to City of Detroit Financing RFP [DTPPF00000961-DTPPF00000980]
70.	Undated, Silver Point Finance, LLC: “Summary of Certain Key Terms and Conditions” responding to City of Detroit Financing RFP [DTPPF00001572-DTPPF00001577]
71.	September 16, 2013, Letter from Gerbino to Miller Buckfire, attaching Barclay’s “Summary of Indicative Terms and Conditions of Swap Termination Note,” “Summary of Indicative Terms and Conditions of Quality of Life Note,” “Summary of Indicative Terms and Conditions of the Replacement Swap Transaction,” and “Muni Swap Confirmation,” responding to City of Detroit Financing RFP [DTPPF00000856-DTPPF00000902]
72.	September 16, 2013, Letter from Gubner to Miller Buckfire regarding PIMCO Distressed Credit Fund, L.P., “Letter of Intent – Proposed DIP Facility” responding to City of Detroit Financing RFP [DTPPF00001040-DTPPF00001057]
73.	September 16, 2013, Letter from Kersten to Corio, attaching CarVal Investors “Proposal A” and “Proposal B,” responding to City of Detroit Financing RFP. [DTPPF00000908-DTPPF00000943]
74.	September 16, 2013, “Proposal for Post-Petition Financing” by Bank of America Merrill Lynch, responding to City of Detroit Financing RFP. [DTPPF00000838-DTPPF00000855]
75.	September 16, 2013, Amalgamated Bank “Expression of Interest,” responding to City of Detroit Financing RFP. [DTPPF00000821-DTPPF00000825]
76.	September 12, 2013, Letter from Antonczak to Corio regarding Flagstar Bank’s response to City of Detroit Financing RFP. [DTPPF00000959-DTPPF00000960]
77.	October 8, 2013, Email from Cherner to Doak regarding Beal Bank USA’s Detroit DIP Financing Indicative Term Sheet in response to City of Detroit Financing RFP. [DTPPF00013170-DTPPF00013195]
78.	October 3, 2013, Syncora DIP Term Sheet regarding Syncora Capital Assurance Inc.’s (“Syncora”) and Financial Guaranty Insurance Company’s (“FGIC”) DIP financing proposal [DTPPF00000035- DTPPF00000037]



City's Exhibit No.	Exhibit Description
79.	October 25, 2013, Syncora DIP Term Sheet regarding Syncora's DIP financing proposal [DTPPF00001578- DTPPF00001580]
80.	September 2013, Syncora and FGIC's Outline of Terms and Conditions for Secured First Lien, First out DIP Loan Facility in the Amount of \$350 Million [DTPPF00013640- DTPPF00013656]
81.	September 30, 2013, Letter from Gerbino to Corio regarding Barclay's Commitment to \$350,000,000 in Post-Petition Financing.[ DTPPF00003377- DTPPF00003404]
82.	September 30, 2013, Letter from Gerbino to Corio regarding Barclay's Engagement Letter for Exit Financing [DTPPF00003405- DTPPF00003415]
83.	September 30, 2013, Letter from Gerbino to Corio regarding Barclay's Fee Letter [DTPPF00003416- DTPPF00003420]
84.	September 30, 2013, Goldman Sachs' Draft Commitment Letter, including Annex A and B [DTPPF00001543- DTPPF00001567]
85.	September 30, 2013, Goldman Sachs' Draft Fee Letter [DTPPF00001568- DTPPF00001571]
86.	September 30, 2013, Letter from Stephens to Orr regarding Bank of America Merrill Lynch Commitment Letter with Annex A through C, and a "Proposal for Post-Petition Financing" [DTPPF00001058- DTPPF00001086]
87.	October 2, 2013, Letter from Kersten to The City of Detroit regarding CarVal Investors Commitment Letter, including Exhibit A [DTPPF00011494- DTPPF00011516]
88.	September 26, 2013, Miller Buckfire, "Post-Petition Financing Discussion" [DTPPF000202215- DTPPF00020225]
89.	October 3, 2013, Miller Buckfire, "Draft Detroit Post-Petition Financing: Commitment Letter Summaries" [DTPPF00020226- DTPPF00020231]
90.	October 7, 2013, Miller Buckfire, "Briefing Materials Prepared for Members of City Council" [DTPPF00020039- DTPPF00020071]
91.	October 17, 2013, Miller Buckfire, "Briefing Material Prepared for City Council Closed Session" "

City's Exhibit No.	Exhibit Description
	[DTPPF00012993- DTPPF00013024]
92.	November 4, 2013, Miller Buckfire, "Briefing Materials Prepared for the Financial Advisory Board" "[DTPPF00001959- DTPPF00001968]
93.	October 6, 2013, Barclay's Fee Letter fully executed by Barclay's and City [Filed as Docket No. 1761]
94.	October 6, 2013, Barclay's Commitment Letter, including Term Sheets, fully executed by Barclays and City [Filed as Docket No. 1520; Exhibit 6A]
95.	2013 Draft Financial Recovery Bonds Series 2013A (Swap Termination) Bond Purchase Agreement [Filed as Docket No. 1520; Exhibit 6B]
96.	October 8, 2013, Letter from Orr to Michigan State Treasurer Andy Dillon regarding Financing [DTPPF00001366-DTPPF00001406]
97.	October 11, 2013, Letter from State Treasurer Dillon to Orr Approving Financing [DTPPF00012230-DTPPF00012233]
98.	October 11, 2013, Email from Hayes to City Council attaching October 11, 2013, Letter from Orr to All City Council Members Re: Emergency Manager's Order No. 17: Approval of Postpetition Financing; October 11, 2013 Emergency Manager Order No. 17; Undated Barclay's "Summary of Indicative Terms and Conditions of Quality of Life Loan;" and, Undated City Council Resolution Approving Post Petition Financing [DTPPF00019623-DTPPF00019655]
99.	October 11, 2013, Email from Hayes to Bonsall, et al., attaching October 11, 2013, Letter from Orr to Mayor Bing regarding Emergency Manager's Order No. 17: Approval of Postpetition Financing; October 11, 2013 Emergency Manager Order No. 17; and, Undated Barclay's "Summary of Indicative Terms and Conditions of Quality of Life Loan" [DTPPF00019592-DTPPF00019622]
100.	November 6, 2013, Letter from Bulger to Goodrich regarding City of Detroit's submission to Local Emergency Financial Assistance Loan Board
101.	November 5, 2013, Declaration of Charles M. Moore In Support of Motion of the Debtor for a Final Order Pursuant to 11 U.S.C. §§ 105, 362, 364 (c)(1), 364(c)(2), 364(e), 364(f),

City's Exhibit No.	Exhibit Description
	503, 507(a)(2), 904, 921 and 922 (I) Approving Post-Petition Financing, (II) Granting Liens and Providing Superpriority Claim Status and (III) Modifying Automatic Stay [Filed as Docket No. 1520; Exhibit 5A]
102.	November 5, 2013, Declaration of James Doak In Support of Motion of the Debtor for a Final Order Pursuant to 11 U.S.C. §§ 105, 362, 364 (c)(1), 364(c)(2), 364(e), 364(f), 503, 507(a)(2), 904, 921 and 922 (I) Approving Post-Petition Financing, (II) Granting Liens and Providing Superpriority Claim Status and (III) Modifying Automatic Stay [Filed as Docket No. 1520; Exhibit 5B]
103.	November 11, 2013, City of Detroit, Operational Restructuring Summary
104.	November 12, 2013, City of Detroit, Operational Restructuring Summary
105.	September 27, 2013, Funding for Detroit Announced by Federal Government
106.	June 21, 2013, Ernst & Young, Project Piston, Cash Flow Forecast – Monthly (FY 2013, FY 2014, FY 2015)
107.	June 21, 2013, Ernst & Young, Project Piston, Cash Flow Forecast (including Restructuring Scenario)
108.	September 16, 2013, Ernst & Young, Project Piston Cash Flow Forecast – through FY 2017 (DIP Financing Scenario)
109.	October 3, 2013, Ernst & Young, Project Piston Cash Flow Forecast – through FY 2017 (No Casino Trap; No DIP)
110.	September 17, 2013, Ernst & Young, Project Piston Cash Flow Forecast – through FY 2017 (Casino Trap; No DIP)
111.	September 18, 2013, Ernst & Young, Illustrative Cash Chart

2. The City reserves the right to supplement its list of exhibits, as provided for in the proposed Scheduling Order.

3. The City will exchange copies of its exhibits on counsel for any objecting parties on a mutually agreeable schedule.

4. The City also reserves the right to utilize demonstrative exhibits at either a deposition or the Evidentiary Hearing. The City will serve copies of any such demonstratives on counsel for any objecting party in advance of its use at a deposition or the Evidentiary Hearing.

5. As of the date of this filing, some objectors have filed Exhibit Lists. However, no objector has provided copies of the exhibits listed, which are necessary in light of the sometimes vague and inadequate descriptions of the listed exhibits. Therefore, the City reserves its rights to assert objections to any exhibits identified by an objecting party after such exhibits have been both identified, and provided, to the City.

Dated: December 9, 2013

Respectfully submitted,

/s/ Bruce Bennett

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ATTORNEYS FOR THE CITY OF  
DETROIT

**Certificate of Service**

I, Bruce Bennett, hereby certify that the foregoing **DEBTOR'S LIST OF EXHIBITS FOR HEARING ON THE CITY OF DETROIT'S ASSUMPTION MOTION [DKTS. 17 AND 157] AND MOTION TO APPROVE POST-PETITION FINANCING [DKT. 1520]** was filed and served via the Court's electronic case filing and noticing system to all parties registered to receive electronic notices in this matter on this 9th day of December 2013.

/s/ Bruce Bennett \_\_\_\_\_  
Bruce Bennett

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

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In re

CITY OF DETROIT, MICHIGAN,

Debtor,

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Chapter 9

Case No. 13-53846

Hon. Steven W. Rhodes

**OMNIBUS REPLY OF THE DEBTOR TO OBJECTIONS TO DEBTOR'S  
MOTION FOR APPROVAL OF POSTPETITION FINANCING**

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The City of Detroit (the “City” or the “Debtor”) hereby files this omnibus reply (the “Reply”) to the objections (the “Objections”) filed in opposition to the Motion of the Debtor for a Final Order Pursuant to 11 U.S.C. §§ 105, 362, 364(c)(1), 364(c)(2), 364(e), 364(f), 503, 507(a)(2), 904, 921 and 922 (I) Approving Post-Petition Financing, (II) Granting Liens and Providing Superpriority Claim Status and (III) Modifying Automatic Stay [Docket No. 1520] (the “Motion”).<sup>1</sup> In support of its Reply, the Debtor respectfully represents as follows:

### **INTRODUCTION**

1. The Objections comprise 15 individual responses to the Motion, reaching into the hundreds of pages.<sup>2</sup> The Objections are directed primarily at the propriety of the Quality of Life Financing, while also taking aim at the substance of the Forbearance Agreement. While voluminous, and ostensibly raising a host of factual and legal issues, the key theme throughout the Objections rests, primarily, on the flawed legal premise that the City’s citizens — for whom the City exists and operates in the first instance, and whose future is most dependent upon the outcome of this proceeding — should have little or no voice in this process.

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<sup>1</sup> Capitalized terms used but not defined herein are accorded the meanings given to them in the Motion.

<sup>2</sup> The Official Committee of Retirees filed a response in support of the Financing Motion [Docket No. 1868].

2. If the objecting parties are correct, the City's ability to borrow pursuant to section 364(c) of the Bankruptcy Code, and to make expenditures on behalf of its citizens, would be curtailed to that which is deemed "essential" by this Court to operate the City, while every penny beyond that would go to creditor recoveries.

3. Meanwhile, any true investment in the City would wait — lights would remain unlit, emergency calls to police and fire would go unanswered, crumbling infrastructure would continue its formidable decay, basic notions of public health, safety and welfare would go on being ignored — until a plan of adjustment is ultimately approved in this case, and, presumably, the appellate process has run its course. The City respectfully submits that Detroit's citizens can no longer be asked to wait. Any suggestion that the woefully inadequate status quo should continue any longer is simply unacceptable.

4. Much ado has been made about the proper scope of review for the present Motion. The fact is, by any standard, the relief sought by the City is appropriate and should be approved. As set forth below, in a chapter 9 proceeding a municipal debtor is generally free to pursue its political and governmental prerogatives without interference from the judiciary. That is no different here. It is simply not the purview of this Court to rule upon the wisdom of each and every expenditure contemplated by the City with respect to the Quality of Life Financing,

which would not only place rigorous, unnecessary demands on this Court, but also clearly present an improper encroachment on the powers of a municipality reserved under section 904 of the Bankruptcy Code.

5. What is required of the Court with respect to the Motion is a finding that the City was unable to obtain credit on an unsecured basis and that the terms of the financing are fair and reasonable, the best available under the circumstances and were reached based upon good faith, arm's length negotiations. In that regard, there can be little doubt that the Quality of Life Financing is appropriate and should be approved.

6. As to need, the City's deterioration over the last half-century is well documented and need not be repeated here. Suffice it to say, however, that the City highlighted in the Motion but a few of the most pressing issues it faces in rebuilding itself. The challenges for the City going forward are extensive and will require a long-term, sustained commitment over years, costing in excess of a billion dollars to begin returning the City to a semblance of what it once was and providing its citizens with the level of services to which they are entitled. That process must begin now.

7. What also is clear, based on the representations of the City and its advisors in the Motion (and as will be presented at the hearing on the Motion), is that the Postpetition Financing was subject to significant market testing, was



heavily negotiated between the City and Barclays — at arm’s length and in good faith — and is the best financing available to the City under the circumstances.

8. Even under the exacting scrutiny proposed by the objecting parties, the City’s decision to borrow the Quality of Life Financing is sound. The City has not, by any stretch of the imagination, proposed extravagant or frivolous expenditures in connection with the Quality of Life Financing. As this Court has already found, years of neglect and fiscal mismanagement have rendered the City “service delivery insolvent.”

9. The Quality of Life Financing is designed to be a responsible step into the long and difficult process of modernizing the City’s operational processes and information technology infrastructure, making critically needed investments in the City’s police and fire departments to enhance public safety and reduce crime, and to continue the City’s on-going efforts to reformulate its post-apocalyptic urban landscape. Hardly gratuitous, the Quality of Life Financing will allow the City to *begin* restoring City services to that of an ordinarily functioning metropolis, capable of providing the most basic of services to its residents so that it can retain its current population and attract new lifeblood to the City’s tax rolls.

10. In the absence of any directly applicable law, the objecting parties spin inapposite analogies to chapter 11, arguing that the recoveries to unsecured creditors should be this Court’s singular focus. In chapter 11, unsecured

creditors are typically the fulcrum constituency and the bankruptcy process in that regard is primarily designed to maximize returns for these parties. Indeed, in most chapter 11 cases, equity is out of the money entirely, and thus, the focus of chapter 11 proceedings is appropriately trained on the recoveries of unsecured creditors, a majority of the time.

11. Here, however, the City's citizens are not shareholders. They have a voice and a stake in the outcome of this case that stretches well beyond that of any creditor objecting to the Motion. The zero-sum approach suggested by the objecting parties, whereby the "best interests of creditors" should be the singular and controlling consideration for every transaction put before this Court is groundless, when the epic failure of one of the great American cities has left nearly 700,000 people to weather the City's economic storm. While creditors in this case may be perfectly sanguine about allowing the City and its residents to "tread water" while the bones are picked clean, there are far larger implications at play, and contrary to what the objecting parties would have this Court believe, the future viability of the City *does matter*.

12. As set forth in detail below, and as will be established at the hearing on the Motion, there is little question that the Quality of Life Financing is an appropriate and proper exercise of the City's judgment and should be approved.

13. With respect to the Objections directed at the Swap Termination Financing, such Objections are really aimed at the merits of the Forbearance Agreement. The City addresses these Objections in the Omnibus Reply of the City of Detroit to Objections to the Motion for Assumption and Approval of the Forbearance and Optional Termination Agreement filed contemporaneously herewith (the “Assumption Reply”). Should this Court approve the Forbearance Agreement Approval Motion, there is little question that the Swap Termination Financing is appropriate.

14. Based on the arguments below, and the evidence that will be presented at the hearing on the Motion, the Objections should be overruled, and the relief in the Motion granted in all respects.

### **SUMMARY OF OBJECTIONS**

15. The substance of the Objections is summarized below. The Debtor is hopeful that it can resolve certain of the Objections in advance of the hearing on the Motion and the Debtor intends to file, in advance thereof, a revised proposed form of order.

16. The key issues raised in the Objections generally can be categorized as follows:<sup>3</sup>

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<sup>3</sup> This summary is not exhaustive of all the Objections.



**1. The Quality Of Life Initiatives Are An Exercise Of The City's Political Judgment About How Best To Fulfill Its Governmental Obligations**

18. A municipality has an overriding governmental responsibility to provide public services that promote the health, safety and welfare of its citizens. The City's inability to fulfill this governmental responsibility, however, has been well documented. For several years, the City has lacked the resources to maintain adequate police, fire, or emergency medical services. The City's work force is understaffed, its equipment is outdated and its infrastructure is crumbling. Blighted properties throughout the City are a haven for crime and a target for arsonists. The City's information technology infrastructure cannot handle the needs of a modern City. Conditions in the City have been described as deplorable. See, e.g., Opinion Regarding Eligibility, p. 107-08 [Docket No. 1945] (December 5, 2013).

19. Through its Quality of Life spending, the City is taking an important step toward raising the public services it provides to the level its citizens deserve. As detailed in its prior filings, the City intends to use the proceeds from the proposed Postpetition Financing to, among other things, increase staffing at the Detroit Police Department to a level adequate to protect the public, transition certain administrative positions from police officers to civilians, purchase new police, fire and emergency medical vehicles, demolish dangerously blighted

structures and better integrate the City's outdated information technology systems. See Moore Decl. at ¶¶ 14, 16, 17, 20. The Quality of Life spending represents the City's considered political judgment about how best to satisfy its governmental obligation to its citizens.

**2. Section 904 Prohibits Efforts By Creditors To Second-Guess the City's Political Judgments**

20. The objecting parties take issue with the City's exercise of its political judgment and urge a broad court review of the planned expenditures to determine whether the money is being spent as efficiently as possible for only essential government services. The objecting parties' efforts to second-guess the City's governmental decision making, however, are not justified.

21. Section 904 of the Bankruptcy Code provides that "unless the debtor consents or the plan so provides, the court may not . . . interfere with — (1) any of the political or governmental powers of the debtor; (2) any of the property or revenues of the debtor; or (3) the debtor's use or enjoyment of any income-producing property." 11 U.S.C. § 904. This provision reflects a recognition of the special solicitude that must be given to municipal debtors within a chapter 9 case resulting from concerns of independence and sovereignty embodied in the Tenth Amendment. See United States v. Bekins, 304 U.S. 27, 50-52 (1938) (relying in part on the presence of the predecessor to section 904 in upholding the constitutionality of the municipal bankruptcy statute); In re Addison Cmty. Hosp.

Auth., 175 B.R. 646, 648 (Bankr. E.D. Mich. 1994) (“A primary distinction between chapter 11 and chapter 9 proceedings is that in the latter, the law must be sensitive to the issue of the sovereignty of the states.”).

22. Section 904 ensures that a municipal debtor is free to manage its own affairs during the bankruptcy case. This provision, on its face, prohibits review of a municipal debtor’s political judgments about how best to expend its revenues to satisfy its governmental obligations. See Addison Hosp., 175 B.R. at 649 (“[Section 904] makes clear that the court may not interfere with the choices a municipality makes as to what services and benefits it will provide” (quoting H.R.Rep. No. 595, at 398)). Perhaps even more tellingly, however, the history of Section 904 makes clear that this limitation is designed to avoid precisely the kind of inquiry the objecting parties now urge.

23. Until 1976, the predecessor to section 904 required a court to determine whether spending by the debtor was “necessary for essential government purposes.” See Bankruptcy Act § 83(c), Act of Aug. 16, 1937, 50 Stat. 657. However, that requirement was removed in the 1976 amendments to the Bankruptcy Act in order to enhance the independence of municipal debtors during the bankruptcy case. See Act of Apr. 8, 1976, 90 Stat. 316; In re City of Stockton, 478 B.R. 8, 18 (detailing the history of section 904); In re City of Stockton, 486 B.R. 194, 198 (Bankr. E.D. Cal. 2013) (same). The review proposed by the

objecting parties disregards this history and attempts to revive the “necessary for essential government purposes” test long ago rejected by Congress. See, e.g., Ambac Objection at 18-19 (“[T]he City has the burden . . . to show that the funding sought is to maintain essential services.”); Id. at 21 (“[T]he Court will be required to determine whether the Post-Petition Financing is necessary to maintain essential services for the citizens of Detroit during the case . . .”).

**3. The City’s Effort To Obtain Approval Of Liens And Superpriority Claims Under Section 364(c) Is Not Consent To The Broad Review Advanced By The Objectors**

24. Recognizing that the plain terms of section 904 prohibit the type of review they seek, certain of the objecting parties argue instead that the City’s effort to obtain approval of its Motion should be interpreted as a waiver of section 904 and consent to a broad review of its Quality of Life expenditures. Such a conclusion is unjustified. It is true that a municipality provides limited consent to bankruptcy court involvement with its governmental decisions when it seeks to use the tools of the Bankruptcy Code to accomplish something it could not do without court involvement. See Stockton, 486 B.R. at 199. That consent, however, extends only so far as necessary to accomplish the proposed transaction. See id.; Leco Properties v. R.E. Crummer & Co., 128 F.2d 110, 113 (5th Cir. 1942) (“[W]hile the jurisdiction conferred by the statute depending, as it does, upon the city’s volition, [it] may not be extended by the court beyond that volition . . .”);



see also H.R. Rep. No. 94-686, 94th Cong., 1st Sess, at 18 (explaining that section 904's consent requirement codifies the result of Leco Properties); In re New York City Off-Track Betting Corp., 434 B.R. 131, 141 (Bankr. S.D.N.Y. 2010) (confining the court's review to the issues to which the municipal debtor had consented).

25. In this case, the City neither needs nor seeks court approval for its governmental decision to spend money on the Quality of Life initiatives. See 11 U.S.C. § 904. Moreover, because section 364(b) does not apply to a chapter 9 case,<sup>4</sup> the City also does not need or seek this Court's authorization to borrow funds to pay for these initiatives. See 11 U.S.C. § 901. Rather, the City seeks this Court's authorization only for its decision to grant liens on certain revenue streams and superpriority claim status to Barclays and this Court's finding of good faith. It is for this limited aspect of the transaction that the City's financial transaction is subject to Court review.

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<sup>4</sup> Indeed, as noted in the legislative history to chapter 9, "if a municipality could borrow money outside of the bankruptcy court, then it should have the same authority in bankruptcy court, under the doctrine of Ashton v. Cameron Water District No. 1, 298 U.S. 513, 56 S. Ct. 892, 80 L. Ed. 1309 (1936) and National League of Cities v. Usery, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976). Only when the municipality needs special authority, such as subordination of existing liens, or special priority for the borrowed funds, will the court become involved in the authorization." See H.R. Rep. No. 595, 95th Cong. 1st Sess. 394 (1977).

26. Evaluating the City's Motion thus requires a consideration of whether the City could obtain credit unencumbered or without superpriority status and that the terms of the financing are fair and reasonable, the best available under the circumstances and were reached based upon good faith, arm's length negotiations. This review does not require an assessment of the City's determination that the money is necessary to meet its obligations to its citizens or an analysis of all of the individual items on which the City is planning to spend the money. Those political and governmental decisions have been committed by section 904 solely to the discretion of the City's legally authorized decision makers. Such judgments are beyond the scope of review under section 364(c).

27. For the foregoing reasons, the City submits that a broad and intensive review of the need and use of the Quality of Life Financing is not appropriate and should not be undertaken by the Court in connection with deciding the Motion. Nevertheless, as detailed below, the City is confident that under any standard of review, the appropriateness of the Postpetition Financing is beyond any serious dispute.

***B. Appropriate Standard of Review For the Relief Sought in the Motion***

**1. Applicability of the *Farmland* Factors**

28. In addition to, and in conjunction with, the objecting parties' urging of a broad scope of review of the Debtor's use of loan proceeds, the

objecting parties have also argued that the relief sought in the Motion should be judged using the factors set forth in the chapter 11 case of In re Farmland Indus., Inc., which consist of the following:

- That the proposed financing is an exercise of sound business judgment;
- That no alternative financing is available on any other basis;
- That the financing is in the best interests of the estate and its creditors;
- Whether there are any better offers, bids, or timely proposals before the court;
- That the financing is necessary to preserve assets of the estate;
- That the terms of the financing are fair, reasonable, and adequate given the circumstances; and
- The financing was negotiated in good faith and at arm's length.

294 B.R. 855, 879-880 (Bankr. W.D. Mo. 2003).

29. Nevertheless, it is hardly clear that these factors apply in a chapter 9 case, as asserted by many of the objecting parties. While certain courts certainly have cited Farmland favorably in chapter 11, the City is not aware of a single case applying these or similar factors in a chapter 9 proceeding.<sup>5</sup> Moreover,

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<sup>5</sup> While post-petition borrowings may be rare in chapter 9, contrary to common belief (and at least one of the Objections) a sizable post-petition borrowing has occurred before in chapter 9 in the case of In re County of Orange, where the debtor borrowed in excess of \$400 million during its chapter 9 proceeding and used the proceeds to make distributions to certain prepetition creditors, and in particular, certain school districts.

it is not clear that bankruptcy courts in the Eastern District of Michigan apply Farmland even in the chapter 11 context.

30. Instead, in determining whether a debtor is entitled to financing in chapter 11 under section 364(c) of the Bankruptcy Code, courts generally have articulated a three-part test, including whether:

- (a) the debtor is unable to obtain unsecured credit;
- (b) the credit transaction is necessary to preserve the assets of the estate; and
- (c) the terms of the transaction are fair, reasonable, and adequate, given the circumstances of the debtor and the proposed lender

In re Ames Dep't Stores, Inc., 115 B.R. 34, 37-39 (Bankr. S.D.N.Y. 1990).

31. Moreover, courts generally defer to the debtor's business judgment in granting post-petition financing under section 364 of the Bankruptcy Code. See In re YL W. 87th Holdings I LLC, 423 B.R. 421, 441 (Bankr. S.D.N.Y. 2010) ("Courts have generally deferred to a debtor's business judgment in granting section 364 financing."); In re Mid-State Raceway, 323 B.R. 40, 58 (Bankr. S.D.N.Y. 2005) (holding that "to overcome the business judgment rule, the entity opposing the decision by the directors must establish that they acted in bad faith or with fraudulent intent.").

32. Nevertheless, even under the more exacting standard of the Farmland factors, the Postpetition Financing should be approved.

**2. The Financing Should be Approved Even Under The Farmland Factors**

**a. The Financing is a Sound Exercise of the City's Judgment**

***Swap Termination Financing***

33. There seems to be little dispute that the Swap Termination Financing is an appropriate and necessary transaction if the Forbearance Agreement is approved by this Court. While many Objections have been leveled at the Forbearance Agreement itself, that debate is reserved for the Assumption Reply. If the Forbearance Agreement is approved, the City will likely require between \$200 million and \$230 million in connection with the termination of the Swap Agreements. Terminating the Swap Agreements early in accordance with the Forbearance Agreement will save the City millions of dollars in almost immediately recognized savings and will significantly reduce the costs of carrying the debt associated with the Swap Agreements. There can be no credible dispute that in this circumstance the Swap Termination Financing is a sound exercise of the City's judgment.

***Quality of Life Financing***

34. The objecting parties argue that the Quality of Life Financing is not an appropriate exercise of the City's judgment because the City (i) has sufficient resources available, without any borrowing, to make near-term investments, and (ii) does not have a sufficiently detailed plan for utilizing the

proceeds of the Quality of Life Funds. The objecting parties' arguments fail on both fronts.

35. First, the City does not have the available resources to meaningfully fund investment initiatives in the near-term. Citing recent cash-flow statements provided by the City, many of the objecting parties argue that the City has \$128.5 million of net cash (which is more than the \$93.5 million of cash that had been projected by the City). The objecting parties also argue that the City is “awash” in federal funding. Each of these sources of funding can be used to fund investment initiatives without any additional borrowing, so the argument goes.

36. As of December 1, 2013, the City has approximately \$107 million of net operating cash and investments in the City’s general fund. This balance is largely reflective of the City’s collection of summer property taxes. As has historically been the case, the City’s “high water” mark for net cash in its general fund is August and September — when the City collects the bulk of its property tax revenue. Cash decreases in time as the fiscal year progresses. The City’s current cash balance is also a result of the fact that the City has been receiving approximately \$11 million per month in wagering tax revenue for the last 6 months in connection with the Forbearance Agreement that, absent the Forbearance Agreement, may not have flowed into City coffers.

37. The objecting parties are correct in that the City's projected spend for the fiscal year 2014 with respect to reinvestment initiatives is approximately \$170 million — a sum that the City determined would provide a meaningful investment in necessary projects for the year. To actually effectuate those projects, however, it was *assumed* that the City would have access to the Quality of Life Financing. Because the City has yet to procure post-petition financing, the City has committed to very few reinvestment projects so as to avoid any risk of it committing to projects it could not then afford to fund. Without access to post-petition financing, if the City sought to fund reinvestment initiatives at the rate projected for the fiscal year 2014, the City would run out of money by May, 2014.<sup>6</sup>

38. As will be established at the hearing on the Motion, the City's projected cash balances are subject to significant downside risks or threats, including:

- Additional cash potentially needed to settle accounts payable invoices;
- The potential need to transfer funds currently held in the City's general fund into other special purposes accounts;
- Current litigation seeking to cause the City to segregate revenues from certain *ad valorem* taxes, resulting in an immediate loss to the general

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<sup>6</sup> Financial Guaranty Insurance Company “FGIC”) seems to recognize this fact, see FGIC Objection ¶ 19, but nevertheless *still* suggests that the Postpetition Financing is unnecessary.

fund of \$30 million and an annual cost of as much as \$50 million in revenues on a go-forward basis;<sup>7</sup>

- The loss of wagering tax revenues in the amount of approximately \$11 million per month if the Forbearance Agreement, and the assumption thereof, is not approved by this Court; and
- Needs in connection with any agreement to continue making OPEB payments beyond the current agreement which expires in February, 2014, at a cost of \$12 to \$15 million per month.

39. Thus, the reality is that the City's current cash is critically necessary to simply fund the City's operations and cannot be responsibly diverted to fund any meaningful investment in the City, even in the short-term, particularly in light of these potential down-side risks.

40. Moreover, as will also be established at the hearing on the Motion, of the \$350 million of cited federal funds that supposedly may be used for City revitalization, only approximately \$50 million of such funds cited by the objecting parties is not already budgeted and would act as a substitute for the City's already contemplated reinvestment spending. In any event, the City's needs with respect to reinvestment far outstrip available funds.

41. Finally, assertions that the City has "no immediate plans" for spending the proceeds of the Quality of Life Financing is also of no persuasion.

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<sup>7</sup> The City vigorously denies that it has any obligation in this regard. Nevertheless, one of the objecting parties seeking to have the City segregate tax revenues is also arguing that the Quality of Life Financing is unnecessary because the City has sufficient cash on hand to fund any reinvestment initiatives. The two positions cannot be squared.



While the City continues to examine the most effective use of the funds, it is without dispute that there is no shortage of immediate and urgent needs within the City, the most pressing of which were set forth in the Motion. If that were not enough, the Proposal for Creditors presented on June 14, 2013 set forth, in extensive detail, the initiatives the City intends to embark upon in the coming years, many of which can be commenced in the very near-term.<sup>8</sup> Additionally, on November 11 and 12, 2013, the City and its representatives held two days of meetings with representatives of many of the objecting parties, during which it outlined the City's planned operational restructuring initiatives, and where nearly 130 pages of information was shared by the City on the very topics covered in the Motion, among many others. The City has also conducted various due diligence sessions with advisors of certain creditors and have supplemented both the Proposal for Creditors and the post-petition financing cash flows with supporting detail to give greater clarity in respect of the reinvestment initiatives.

42. To suggest that the City "has no plan" for the use of Quality of Life funds therefore is disingenuous.<sup>9</sup> The City's operational restructuring

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<sup>8</sup> See City of Detroit Proposal for Creditors dated June 14, 2013 at pp. 9-22; 61-78.

<sup>9</sup> Certain objecting parties have also argued that the proposed pledge of the wagering tax revenues is not in compliance with applicable Michigan law that authorizes the levy of wagering taxes in the first instance. Section 12(3)(a) of the Michigan Gaming Control and Revenue Act, M.C.L.A 432.312, provides that the

roadmap is well laid out, has been extensively shared with creditors and parties in interest and is ready, in the near-term, for the City to pursue, at least in part, once the necessary funds become available.

**b. The Financing Satisfies Any Appropriate “Best Interests” Analysis**

43. The objecting parties have almost uniformly argued, in one form or another, that the key element in analyzing the Postpetition Financing is whether the financing is in the best interest of creditors. The collective argument in this regard is that the City is not authorized to borrow under section 364(c) of the Bankruptcy Code unless the proceeds of the borrowing are used to fund only “essential” services that cannot otherwise be funded through tax receipts *and* the use of funds maximizes returns to creditors in some quantifiable manner.

44. In the absence of any binding authority as support for their novel interpretation of the law, the objecting parties argue that the confirmation standards under section 943 of the Bankruptcy Code should be the benchmark, and, in particular, the requirement that a plan of adjustment be “in the best interests of creditors.” See 11 U.S.C. §943(b)(7).

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City may use its percentage of wagering tax revenues for any number of enumerated purposes, including programs “designed to contribute to the improvement of the quality of life in the city.” That is precisely the stated use of the Quality of Life Financing proceeds and, thus, that aspect of the Postpetition Financing complies with Michigan law.

45. As an initial matter, there is no support for the proposition that confirmation standards are at all relevant to a court's inquiry into the merits of a post-petition borrowing under section 364(c) of the Bankruptcy Code. See, e.g., Anchor Sav. Bank FSB v. Sky Valley, Inc., 99 B.R. 117, 123 (N.D. Ga. 1989) (“[I]t is not necessary to test the lien proposal against the confirmation requirements of § 1129”); In re 495 Cent. Park Ave. Corp., 136 B.R. 626, 632 (Bankr. S.D.N.Y. 1992) (“The absolute priority rule is a confirmation standard which does not apply to a preconfirmation contested matter involving a debtor's request to obtain senior credit”); In re Babcock & Wilcox Co., 250 F.3d 955, 960-61 (5th Cir. 2001) (same).

46. If Congress intended confirmation standards to be applied in this context, it would have clearly made that cross reference. But it did not. Instead, Congress incorporated section 364(c) into chapter 9, to be applied as written. This Court should not read into section 364(c) a standard that is simply not there.

47. Moreover, even if reference to section 943(b)(7) were appropriate to inform the inquiry here, the objecting parties badly misstate the law with respect to how courts in chapter 9 have long viewed the “best interest of creditors” requirement.

48. Instead of expressing an absolute preference for creditors, as suggested, the best interest requirement simply requires that creditors under a plan of adjustment collectively do at least as well as they would if the chapter 9 case were dismissed. See Mount Carbon Metro. Dist., 242 B.R. 18, 34 (Bankr. D. Colo. 1999) (stating the best interests test in a chapter 9 is “often easy to establish” but nevertheless denying confirmation because *creditors were receiving too much* under the proposed plan at the expense of the municipality’s services to residents).

chapter 9 proceeding. Id. (“[T]here is no purpose in confirming a Chapter 9 plan if the municipality will be unable to provide future governmental services.”).

50. Thus, for example, section 943(b)(7) specifically requires that a plan be “feasible,” which has been interpreted to mean that the debtor is able “to make the payments required under the plan *and still maintain its operations at the level that it selects as necessary to [the] continued viability of the municipality.*” 9 Collier on Bankruptcy ¶ 943.03[7][b] (emphasis added); Mount Carbon, 242 B.R. at 37 (“The question of feasibility is whether the Plan is a suitable vehicle for the District to repay its pre-petition debts and to provide future public services.”).

51. And even the “fair and equitable” standard of section 1129(b), as applied in chapter 9, incorporates the notion that the debtor’s return to viability is of first importance, requiring that the debtor provide a dissenting class of creditors no more than it “can reasonably expect in the circumstances.” Lorber v. Vista Irrigation Dist., 127 F.2d 628, 639 (9th Cir. 1944).

52. Nothing cited by the objecting parties is to the contrary. The chief case cited by many of the objecting parties in support of their misguided standard of review is Fano v. Newport Heights Irr. Dist., 114 F.2d 563 (9th Cir. 1940), a case involving a bankrupt irrigation district. Fano, in the first instance, arose in the context of plan confirmation, not a financing motion and should

therefore have no bearing on a motion under section 364(c) of the Bankruptcy Code.

53. Moreover, in Fano the court reversed a lower court order confirming the debtor's plan after holding that the debtor was grossly solvent, had spent extravagantly prior to its bankruptcy filing to improve its infrastructure and, thus, had sufficient wherewithal to increase taxes to cover its debt service. 114 F.2d at 565-66. As a consequence, the court held that the proposed impairment of bondholders under the debtor's plan was not appropriate. *id.* Thus, Fano stands for the uncontroversial proposition that a debtor in chapter 9 may need to access its taxing power in connection with a plan of adjustment to the extent that is possible under applicable law and the circumstances of the case.<sup>10</sup>

54. More importantly, however, in no event can Fano be read to say — whether under section 364 *or* 943 of the Bankruptcy Code — that a city in chapter 9 is prohibited from making improvements to its infrastructure and the services it provides to citizens unless there is a quantifiable enhancement to the

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<sup>10</sup> On the same day that Fano was decided, the Ninth Circuit issued three other chapter IX decisions: Newhouse v. Corcoran Irr. Dist., 114 F.2d 690 (9th Cir. 1940), W. Coast Life Ins. Co. v. Merced Irr. Dist., 114 F.2d 654 (9th Cir. 1940) and Moody v. James Irr. Dist., 114 F.2d 685 (9th Cir. 1940). All of these decisions were authored by Circuit Judge Stephens. In each of Newhouse, West Coast and Moody, the Court determined that the Districts could not increase taxes to pay creditors and affirmed the confirmation of their plans of adjustment.

recoveries of creditors.<sup>11</sup> See, e.g., In re City of Columbia Falls, Mont., Special Imp. Dists., 143 B.R. 750, 759 (Bankr. D. Mont. 1992) (stating that “[h]ad the Montana legislature sought to require municipalities to pay all of their debts in full, regardless of the cost to city services, it could have merely refused to permit municipalities to file Chapter 9 petitions ....”); Matter of Sanitary & Imp. Dist. No. 7, 98 B.R. 970, 974 (Bankr. D. Neb. 1989) (“[T]he debtor may obtain confirmation of a plan, over objection, which does not utilize all of the assets of the estate to retire its obligations.”); Moody v. James Irr. Dist., 114 F.2d 685, 689 (9th Cir. 1940) (“To afford the plan of payment proposed the District must be in a position to proceed as a going District and for this reason its cash in hand cannot be too greatly depleted.”). Indeed, “[b]ecause the purpose of municipalities (i.e. police protection, fire protection, sewage, garbage removal, schools, hospitals) is to

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<sup>11</sup> Certain of the other “confirmation” cases cited by the objecting parties also do not advance the argument that the Postpetition Financing somehow violates the “best interests” test. Instead, in those cases, the courts found that the “best interest” test was met and reinforces the proposition that the continued ability of a municipality to provide services to its residents in a chapter 9 case is of paramount concern. See In re Connector 2000 Ass’n, Inc., 447 B.R. 752 (Bankr. D.S.C. 2011) (confirming plan and providing that best interests of creditors was served by debtor’s plan); In re Barnwell Cnty. Hosp., 471 B.R. 849 (Bankr. D.S.C. 2012) (confirming plan and noting that “of particular importance to the Court” was the fact that the proposed plan “preserves the availability of healthcare services to citizens and patients in the County.”). In re Pierce Cnty. Hous. Auth., 414 B.R. 702 (Bankr. W.D. Wash. 2009), the other case cited by the objecting parties, is also of no moment here, as that case involved the issue of whether a debtor should abandon certain assets as part of a plan.

provide essential services to residents, it is crucial that chapter 9 relief allow these entities enough flexibility to remain viable.” Addison Cmty. Hosp., 175 B.R. at 648.

55. The Court has already found that as of the Petition Date, the City was “in a state of ‘service delivery insolvency’ ... and will continue to be for the foreseeable future.” See Opinion Regarding Eligibility, p. 107 [Docket No. 1945] (December 5, 2013). Indeed, the City is not providing “services at the level and quality that are required for the health, safety, and welfare of the community.” id. at 108. The deterioration in the City’s basic operating functions has been so complete that it can hardly be said that the City is providing even some of the most basic of City services to its nearly 700,000 residents.

56. While ostensibly recognizing the City's dire circumstances, the objecting parties nevertheless assert that this Court should give short shrift to such concerns, focusing instead solely on the interests of creditors and how the Postpetition Financing will enhance their recoveries. Such an approach is misguided and is not the law. Indeed, City residents did not assume the risk of the City's failure or insolvency. They did not agree that their access to public services, including police, fire and emergency services, would be subordinate to the repayment of the City's creditors. Nor did they agree to live with blight and darkness until the City's debts are satisfied.



57. While the City believes that its revitalization will ultimately have a positive impact on the economic interests of many of the objecting parties, the City respectfully submits that the Court must also consider the interests of the City's residents, which will be greatly served by the Postpetition Financing, and in particular, the Quality of Life Financing.

**c. The Terms of Financing are Fair and Reasonable and There Were No Better Alternative Financing Options Available**

58. As will be established at the hearing on the Motion, and which is not subject to any serious dispute, the Postpetition Financing is the product of a robust process run by Miller Buckfire, the City's investment bank, which involved the solicitation of over 50 lending institutions and resulted in more than a dozen lending proposals. These proposals were further distilled to approximately four serious contending lenders until, ultimately, Barclays emerged as the successful lender.

59. The terms of the Postpetition Financing are highly favorable to an entity in bankruptcy and were the best available among the numerous proposals the City received from prospective lenders. Indeed, Barclays' terms were thoroughly market tested and no better options materialized.

60. The interest rate is 3.5%, and, even with full market flex, is not likely to exceed 6.5%. Financings for entities in bankruptcy frequently feature

interest rates into the double digits. The secured nature of the loan was key for purposes of keeping the cost of the loan low. Additionally, unsecured debt has not been available to the City for years given its highly distressed circumstances, and, thus, was not effectively available to the City in this chapter 9 case, particularly with the City's eligibility subject to heavy litigation.

61. The collateral package, far from being overreaching, as suggested by some, is quite favorable, in the sense that while the Postpetition Financing will be "secured" by a pledge of the City's wagering and income tax revenues, Barclays only has secured recourse to tax revenue limited to the payment of \$4 million per month from each source of tax revenue to pay down the principal and interest owing on the bonds in due course. See Indenture §902(c). During that time, the City remains in control of the remainder of the pledged tax revenue, subject to a requirement that the City hold \$5 million in each tax revenue deposit account. See Commitment Letter dated October 6, 2013, Terms & Conditions §4; Indenture §708(a). Thus, unlike most secured financings where a lender can foreclose on its collateral to repay itself promptly, it would take Barclays over three years to do so under the terms of the Postpetition Financing.

62. With respect to Asset Proceeds Collateral, the City is not obligated to engage in any transactions to monetize any City-owned assets (even following an event of default), and Barclays' right to receive proceeds is only

triggered in connection with a large monetization transaction, which is not anticipated by the City at this time. Additionally, the super-priority claim granted to Barclays is very typical for a transaction of this type and was a common feature in all of the proposals the City received (including proposals by parties now objecting to this super-priority claim). Moreover, the Postpetition Financing does not include many of the typical “lender control” features typically seen in post-petition financings, such as case milestones and financial covenants. Thus, while many of the objecting parties stated, in conclusory fashion, that the Postpetition Financing “gives Barclays too much control” over the City, such allegations are way off the mark.

63. What’s more is that many of those objecting parties — namely, Syncora, FGIC, Ambac, Assured and National — all submitted financing proposals that were significantly *less favorable* to the City than the terms of the Postpetition Financing, while at the same time inappropriately seeking some favorable treatment for their prepetition claims. And while each of these objecting parties vigorously object to the City’s proposed use of the proceeds of the Postpetition Financing, each of their respective lending proposals would have allowed the City to do precisely what these parties so loudly object to now: to pay-off the Swap Agreements and make quality of life improvements. Their Objections, accordingly, should be dismissed as disingenuous subterfuge.

64. Syncora also argues that the City had a “better” financing option available to it than the Barclays deal based on a two-page PowerPoint presentation Syncora gave to City Council (rather than the City itself) on October 25, 2013<sup>12</sup> — weeks after the City had selected Barclays as its lender.

65. Syncora’s “rough outline” of a lending proposal could hardly be considered a commitment to lend. But even if Syncora was serious about providing the City post-petition financing, the City had serious reservations about whether Syncora could be a suitable lender, given that Syncora is an insurance company, with no track record of lending (in bankruptcy or otherwise), whose parent company’s stock trades at less than a dollar and whose entire publicly traded equity market cap is under \$50 million. In short, Syncora’s financial wherewithal to actually follow through on any lending commitment was, and remains, very uncertain.

66. Moreover, by the end of October, time was of the essence for the City to move forward so that funding could be obtained and put to use by the end of 2013, or the beginning of 2014 at the very latest. The City had run a thorough and lengthy process, in which Syncora was invited to participate, and the City had chosen its preferred lender. To the extent Syncora was serious about

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<sup>12</sup> Syncora’s October 25, 2013 financing proposal was in addition to a far less favorable proposal extended to the City in early October, 2013 referenced in paragraph 63 hereof.

making a new and legitimate proposal to the City, it could have approached the City with a fully documented deal, as the terms of the Barclays proposal were then fully known. Given Syncora's prior self-serving financing proposals, past tactics and its exceedingly adversarial conduct to date in this case, it was clear to the City that Syncora's "financing proposal" to City Council was not serious and was likely another futile attempt to manipulate the process towards its own ends.

67. All rhetoric aside, the fact is the Postpetition Financing is the best financing available to the City at this time. It is the product of an extensive process, involving dozens of prospective lenders. The terms were heavily negotiated, in good faith and at arm's length and are fair and reasonable under the circumstances.

**d. A Section 364(e) Finding is Appropriate**

68. Certain of the objecting parties have argued that the City has not proposed the financing in good faith and that a finding under section 364(e) of the Bankruptcy Code is not appropriate. The allegations in this regard take a myriad of forms — all of which fall flat.

69. The basic purpose of section 364(e) of the Bankruptcy Code is "to encourage postpetition financing by ... giving the lender priority.... [and] protect[ing] the authorization for priority on a lien from reversal or modification on appeal, as long as the order has not been stayed pending appeal and the creditor

extended credit in good faith.” In re Ellingsen MacLean Oil Co., Inc., 834 F.2d 599, 603 (6th Cir. 1987). While the Bankruptcy Code fails to define the term “good faith,” the Sixth Circuit has acknowledged courts look to the definition found in the Uniform Commercial Code: “Good faith means honesty in fact in the conduct or transaction concerned.” id. at 604-05; see also In re Pan Am Corp., 1992 WL 154200 at \*4 (S.D.N.Y. June 18, 1992) (examining whether factors such as fraud or collusion existed in determining whether a lender acted in “good faith” under section 364(e) of the Bankruptcy Code).

70. Courts have found a lack of good faith when parties fail to disclose ulterior motives or material facts to the bankruptcy court and those motives or facts may impact a court’s reasoning. In re White Crane Trading Co., Inc., 170 B.R. 694, 705 (Bankr. E.D. Cal. 1994). A lack of “good faith” also may exist when it is “evident from the loan agreement itself that the transaction has an intended effect that is improper under the Bankruptcy Code.” Matter of EDC Holding Co., 676 F.2d 945, 948 (7th Cir. 1982) (deciding that a lender lacked good faith with respect to a portion of its loan agreement that required the debtor to utilize \$77,000 of the loan proceeds to pay the attorney’s fees of an unsecured creditor group).

71. Good faith is present in this case. The negotiations between the City and Barclays proceeded at arm’s length. Moreover, the City has fully

complied with P.A. 436, contrary to certain assertions in the Objections. The transaction was made public and submitted to City Council in a timely manner and City Council was afforded the statutory period to consider and review the proposed terms.

72. Counsel for the City fully engaged City Council during its consideration period with regard to any questions and concerns regarding the proposal. The City's cooperation included attending a closed door question and answer period with the full City Council, as well as participating in conference calls with City Council's staff. Additionally, the City shared relevant documents relating to the transaction with City Council and its staff and provided written answers to more than 20 questions from City Council regarding the transaction and other related issues.

73. Although the Fee Letter was not provided to City Council, the commitment fee was not an element of the proposal that required City Council approval, and in any event, this has no bearing on the process at this point given that City Council did not ultimately approve the transaction (and thus, any omission of the Fee Letter could not have prejudiced the process).

74. The ELB is also considering the City's request for approval of the transaction, and ELB approval is a condition to closing the financing.

Consequently, the City submits that prior to any closing of the transaction, the ELB will have approved the financing.

75. Additionally, certain parties have alleged bad faith, asserting that the City failed to disclose that the commitment fee owing to Barclays had been paid, in part, before the Motion was filed. As an initial matter, the City disclosed to the Court in the Motion that 50% of the commitment fee was paid prior to the filing of the Motion. See Motion ¶ 39. Moreover, the City was contractually obligated to Barclays to keep the commitment fee confidential (pending an order of this Court) and to seek permission to file the Fee Letter under seal, which the City promptly did on the same date the Motion was filed. The existence of the commitment fee, and the early payment thereof, has never been hidden by the City.

76. Other objecting parties have argued that the City has provided insufficient disclosure regarding the use of proceeds to give an adequate basis for the Court to find that the Postpetition Financing is proposed in good faith. Aside from the lengthy discussion of the anticipated use of proceeds set forth in the Motion, as previously noted, the Proposal for Creditors dated June 14, 2013 contains a substantial presentation of many of the investment initiatives the City intends to undertake. Additionally, as noted, on November 11 and 12, 2013, the City and its representatives convened all-day meetings with representatives of many of the objecting parties that disingenuously complain of a lack of



transparency on this topic. These meetings were devoted to an in-depth discussion of the City's planned operational restructuring initiatives, where nearly 130 pages of information was shared by the City on the very topics covered in the Motion, among many others.

77. Others argue more generally that the Debtor has not been transparent in this case. The City would note that the objecting parties constitute a large, disparate group of highly litigious parties. Coordinating negotiations on any particular initiative of the City on an individual basis typically is not practical. Nevertheless, the City has been communicating with its creditors collectively and in good faith, including participating in the various Court-ordered mediations, some of which are designed to tackle the issue of information sharing. The City has been engaged with most of the objecting parties — in formal mediation, and in meetings and on conference calls — on a wide variety of issues, including the plan of adjustment and the Forbearance Agreement. It will continue to do so.

78. Additionally, in connection with mediation, reams of information have been shared with the objecting parties, and the City has held numerous less formal calls and meetings with many of the objecting parties on a number of issues. Indeed, the data room arranged by the City, to which new information is being consistently added and to which many if not all of the objecting parties have access, contains literally thousands of pages of information

regarding the City's cash flows and reinvestment and restructuring plans, among many other topics.

79. To say the City has not been transparent on its restructuring plans or any other matter at this point is just not accurate. The City and Barclays have operated in good faith in connection with the Postpetition Financing and a finding under 364(e) is appropriate in this case.

***C. Key Investments in the City Must Begin Now***

**1. The City is Not Required to Wait Until Plan Confirmation to Begin Critical Investments**

80. Delay. That is the message from the objecting parties. Although they claim to recognize the severe challenges facing the City and its citizens — how could they not? — they nevertheless request from this Court further delay. As this Court has noted, there is simply “no justification for imposing [inept City services] upon [the residents] for another day.” Hearing Tr., November 14, 2013 (2:36 p.m.), p. 39, 12-21.

81. If Congress had intended for a proposed borrowing to be conducted only as part of a plan of adjustment, it could have very easily made that restriction clear, but that is not the case. Large transactions are frequently conducted in bankruptcy proceedings in advance of a plan of reorganization or adjustment, including financings, assets sales (including sales of substantially all of

a debtor's assets), litigation and claim settlements, and other restructuring initiatives.

82. The objecting parties' argument is functionally similar to arguing that assumption or rejection of a contract should await confirmation of a plan. Such arguments have been made in chapter 11 cases based upon the possibility that the debtor may not be able to confirm a plan. Those arguments, however, are commonly rejected by courts because section 365 — much like section 364 — does not first require plan confirmation. See e.g., In re Northwest Airlines Corp., 366 B.R. 270, 272 (Bankr. S.D.N.Y. 2007) (debtor rejected collective bargaining agreement prior to proposing a plan; “although the possibility always exists that a debtor's financial condition may change, neither § 1113 nor § 365 requires a debtor to wait until the end of a Chapter 11 case to move to assume or reject”); In re Braniff Airways, Inc., 25 B.R. 216, 220-221 (Bankr. N.D. Tex. 1982) (rejection of collective bargaining agreement approved prior to consideration of chapter 11 plan).

83. There is no requirement that a municipality wait until plan confirmation to begin making key investments on behalf of its citizens. Quite the contrary; a municipality must be in a position to provide basic services to its citizens at all times, and having cash on hand is necessary to meet those obligations. Addison Cmty. Hosp., 175 B.R. at 648; Moody, 114 F.2d at 689

("[T]he District must be in a position to proceed as a going District, and for this reason its cash in hand cannot be too greatly depleted."). Waiting further to make these investments will only cause the City's problems to compound and, thus, increase the cost of fixing them later.

84. Additionally, while parties have strenuously argued that the reinvestment initiatives should only be done as part of a plan of adjustment, such a position neglects the fact that a significant portion of the Postpetition Financing will be used to fund termination of the Swap Agreements, which will need to be effectuated at this time and well in advance of confirmation of any plan of adjustment in this case.

85. Based on the foregoing, there is no justification to find that the Postpetition Financing should be deferred to a plan of adjustment.

## **2. The Financing is Not a *Sub Rosa* Plan**

86. Additionally, there is no basis for the allegation that the Postpetition Financing constitutes a *sub rosa* plan. The Objections in this regard are really, in essence, objections to the Forbearance Agreement as they rest on the assertion that paying prepetition claims outside of a plan of adjustment is inappropriate. That issue, however, will be decided in connection with the Forbearance Agreement Assumption Motion, and has little bearing on the terms of the Postpetition Financing, which contains no elements of a plan of adjustment.

Indeed, courts, historically, have taken a strict approach to the “*sub rosa*” doctrine, and have applied it only in extreme cases where the proposed transaction dictates the specific terms of a future plan.

87. For instance, in Braniff, the seminal case on the issue, the court denied approval of a transaction that would have transferred the debtor’s cash, aircraft and equipment, and terminal leases to another airline in exchange for certain consideration from the purchaser. In re Braniff Airways Inc., 700 F.2d 935 (5th Cir. 1983). The court found that the agreement (i) had the effect of dictating how, and to which creditors, certain valuable assets of the debtor would be distributed under a plan, (ii) required the debtor’s secured creditors to vote in favor of any future reorganization plan and (iii) provided for the release of all parties against the debtor, the debtor’s secured creditors and the debtor’s officers and directors. Id. at 940.

88. Following the Braniff decision, courts have refused to find that a transaction violates the *sub rosa* principle absent extreme facts similar to those present in Braniff. See In re Flight Transportation Corp. Securities Litigation, 730 F.2d 1128 (8th Cir. 1984) (approving settlement agreement over *sub rosa* objection by finding that there were no plan terms dictated and no rights to vote on a plan compromised); Cajun Electric Power Co-op., Inc., 119 F.3d 349, 354 (5th Cir.

1997) (giving strict interpretation of *sub rosa* standards and approving settlement agreement because none of the Braniff factors were present).

89. In this case, it is clear that the key facts necessary to justify a finding that the Proposed Financing constitutes a *sub rosa* plan are not even remotely present: terms of a plan of adjustment are not being dictated, there is no commitment by any party to vote in favor of any future plan and no assets are being distributed to creditors on account of prepetition claims that will not have been approved by this Court. Accordingly, the Proposed Financing is not a *sub rosa* plan.

***D. The Super-Priority Claim Objections Are Specious***

90. Ambac, Assured and National (the “Bond Insurers”) each allege that Michigan law affords them, in connection with certain bonds they insure, some form of special interest in certain *ad valorem* taxes (the “Taxes”) collected by the City. In particular, these parties argue that the Taxes should be “carved out” of any super-priority administrative expense claim granted to Barclays under the Proposed Financing Order. As this Court is aware, the Bond Insurers have each filed adversary complaints against the City asserting a special right to the Taxes and seeking, effectively, injunctive relief forcing the City to hold the Taxes in trust for them pending the outcome of this case.

91. As with many of the pleadings filed before this Court by the Bond Insurers, including their adversary complaints, these parties fail to allege affirmatively one critical element to their assertions — the existence of a valid and enforceable lien in the Taxes. If the bonds were in fact secured, then their Objections to Barclay’s super-priority claim would be moot given that any administrative claim would be *unsecured* and *subordinate* to any security interests of the bondholders.

92. But even in the absence of a lien, the Bond Insurers’ Objections miss the point. A super-priority administrative claim is not a claim *against* or *in* any particular asset, unlike a lien or a security interest. A super-priority administrative claim is simply a claim payable from whatever assets are available for distribution to unsecured creditors, except that, the holder of such a claim has priority in recovery over all other unsecured creditors. Thus, to the extent the Bond Insurers are correct in their presentation of the law with respect to their claims — a proposition the City vigorously disputes — then the Taxes would not be available for distribution to Barclays on account of any super-priority administrative claim. Thus, the Bond Insurers’ Objections in this regard ring hollow and should be overruled.

### **CONCLUSION**

For each of the forgoing reasons, the City submits that the Objections

should be overruled and the Motion approved in all respects.



Dated: December 10, 2013

Respectfully submitted,

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ATTORNEYS FOR THE CITY

# CERTIFICATE OF SERVICE

I, David G. Heiman, hereby certify that the foregoing Omnibus Reply of the Debtor to Objections to Debtor's Motion for Approval of Postpetition Financing was filed and served via the Court's electronic case filing and noticing system on this 10th day of December, 2013.

/s/ David G. Heiman